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1036
No. 2838

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA
BANK, a Corporation Organized Under the Laws of State of
Washington,

Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS, His Wife, FALCON
JOSLIN and JANE DOE JOSLIN, His Wife, JOHN
SCHRAM and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER, His Wife, J. W.
CLISE and JANE DOE CLISE, His Wife, F. E. BARBOUR
and JANE DOE BARBOUR, His Wife, and WASHINGTON
SECURITIES COMPANY, a Corporation,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

Clerk,
F. D. Monckton,

AUG 19 1916

Filed

United States
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F. G. NOYES, as Receiver of the WASHINGTON-ALASKA
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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are revised, cancelled matter appearing in the original record is indicated and cancelled herein accordingly. The page from the text is indicated by the number between which the omission seems to have taken place.]

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS, His
Wife, FALCON JOSLIN and JANE DOE
JOSLIN, His Wife, JOHN SCHRAM and
JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR
and JANE DOE BARBOUR, His Wife,
and WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Names and Addresses of Counsel.

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nia.

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H. J. RAMSEY, Esq., Attorney for Plaintiff in Error, 661 Colman Bldg., Seattle, Washington.

H. R. CLISE, Esq., Attorney for Defendant in Error, 405 New York Bldg., Seattle, Washington.

[1*]

C. K. POE, Esq., Attorney for Defendant in Error, 405 New York Bldg., Seattle, Washington.

WILLIAM A. PETERS, Esq., Attorney for Defendant in Error, 546 New York Block, Seattle, Washington.

JOHN H. POWELL, Esq., Attorney for Defendant in Error, 546 New York Block, Seattle, Washington. [2]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation Organized Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS, His Wife, FALCON JOSLIN and JANE DOE JOSLIN, His Wife, JOHN SCHRAM and JANE DOE SCHRAM, His Wife, E. L. WEBSTER and JANE DOE WEBSTER,

*Page-number appearing at foot of page of original certified Record.

His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR
and JANE DOE BARBOUR, His Wife,
and WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Complaint.

Plaintiff complains of the defendants and for
cause of action alleges:

I.

That on or about the 24th day of February, 1905,
the Washington-Alaska Bank, a corporation, was
duly organized under and by virtue of the laws of the
State of Washington for the purpose of carrying on
a general banking business in the Territory of
Alaska, and ever since said date has been and now is
a corporation duly organized and existing under and
by virtue of the said laws. (Said corporation is
hereinafter called the "Washington Company" in
order to distinguish it from the corporation herein-
after denominated the "Nevada Company.") [3]

II.

That ever since the year 1905 the First National
Bank of Fairbanks has been and now is a corporation
duly organized and existing under and by virtue of
the national banking laws of the United States, and
ever since the time of its organization has conducted
a general commercial banking business at the Town
of Fairbanks, Territory of Alaska.

III.

That from on or about the month of October, 1905,
until on or about the month of March, 1908, one E. T.

Barnette, one James W. Hill and one R. C. Wood, as copartners under the firm name and style of The Fairbanks Banking Company, conducted a general banking business in the Town of Fairbanks, Territory of Alaska.

IV.

That on or about the 21st day of January, 1908, The Fairbanks Banking Company was duly organized as a corporation under and by virtue of the laws of the State of Nevada, for the purpose of acquiring, taking over and conducting the business of said copartnership, and ever since said 21st day of January, 1908, said The Fairbanks Banking Company has been a corporation duly organized and existing under and by virtue of the laws of the State of Nevada; that on or about the 8th day of October, 1910, by an amendment to its articles of incorporation, the name of said corporation was changed to Washington-Alaska Bank. (Said corporation is hereinafter called the "Nevada Company" to distinguish it from the corporation herein mentioned as the "Washington Company.") [4]

V.

That said Nevada Company did, on or about the month of March, 1908, in accordance with the purpose for which it was organized, acquire and take over the business of the copartnership known as The Fairbanks Banking Company, and thereafter conducted the same.

VI.

That the said Washington Company, the said Nevada Company and the said First National

Bank of Fairbanks were organized for the purpose of carrying on and conducting a general banking business in the Town of Fairbanks, Territory of Alaska, and the large mining district surrounding said town, and from the date when each of said corporations was organized until as hereinafter set forth the said Washington Company, the said Nevada Company and the said First National Bank, respectively, did carry on a general banking business in the said Town of Fairbanks and the district surrounding it, and not elsewhere. Part of their said banking business consisted of the purchase and sale of native gold, as hereinafter more particularly set forth.

VII.

That ever since the organization and incorporation of said Washington Company, the defendants John Schram, J. W. Clise, Washington Securities Company, F. E. Barbour, Falcon Joslin and W. H. Parsons have been stockholders of the said Washington Company; that ever since the 15th day of September, 1906, the defendant E. L. Webster has been a stockholder of said Washington Company; that ever since the organization and incorporation of said Washington Company the defendants John Schram, J. W. Clise, Falcon Joslin [5] and W. H. Parsons have been directors of said company; that the defendant F. E. Barbour was at all times from the date of the incorporation and organization of said Washington Company until the 3d day of February, 1909, a director of said Washington Company; and that the defendant, E. L. Webster, at all times since said

3d day of February, 1909, has been a director of said Washington Company.

VIII.

That from the time said three banking corporations, respectively, commenced business in the said Town of Fairbanks until the cessation of business by the said Washington Company and said Nevada Company, as hereinafter set forth, the said three banks were the only banks or bankers carrying on business in the said Town of Fairbanks and the surrounding country; that during all of said times there was no other bank or banker within three hundred and fifty miles of said Town of Fairbanks or within six days' travel thereof by regular route from said town; that during all of said times the said three banks had and did among them all the banking business of said town and the region of country surrounding the same extending for hundreds of miles about said town, and did and performed all of the banking business in a large part of the settled portion of the Territory of Alaska known as the Tanana Valley and of the mining country surrounding said valley.

IX.

That the main industry supporting the said Town of Fairbanks, the said Tanana Valley and the country surrounding the said valley, is placer mining, and from said placer mines the owners or operators thereof extracted each year, during all the times herein mentioned, many millions of dollars worth [6] of native and raw placer gold; that the manner in which the said owners and operators carried on

and conducted their business and the necessities of their said business compelled them to sell said gold, so extracted, immediately after its extraction in order to procure the necessary money to carry on and conduct further their mining operations; that by reason of the distance between said mining district of Fairbanks and the other markets for raw gold, to wit, the banks and United States assay office in Seattle, Washington, and the banks and mint in San Francisco, California, the said three banks were then and there the only persons, firms or corporations in said Town of Fairbanks, or in the Tanana Valley, or the country surrounding said valley, provided with sufficient funds and facilities for procuring funds to purchase said gold; that the said miners and operators were thus compelled to and did sell said gold to, or did obtain an advance of cash or credit thereon from one or another of said three banks; that the largest part of the business of each of said three banks consisted, during all the times that they were engaged in the banking business aforesaid, in purchasing said raw gold from the miners, producers, or owners thereof, for a certain percentage of the assay value thereof, and in transporting said gold to the United States assay office at Seattle, Washington, or to the United States mint at San Francisco, California, or by advancing cash or extending credit to said miners, producers and owners thereof, on the security of said gold delivered to them, and in consideration of interest on the money so advanced, or on the credit so extended, or by transporting said gold to the United States assay

office at Seattle, Washington, or to the United States mint at San Francisco, California, in consideration [7] of a percentage charged on the assay value thereof; that a large part of the remaining business of each of the said three banks during all the times herein mentioned was the lending of money upon interest to persons, firms or corporations in said Territory of Alaska and the selling of exchange at said Town of Fairbanks upon banks in other cities and towns in Alaska, and in the cities of the several states of the Union—more particularly Seattle, Washington, and San Francisco, California—and in the cities of various foreign countries, to wit, England, Norway, Sweden, France, Germany and Italy, and also the transferring of money or credit by telegraph from said Town of Fairbanks to other cities or towns in Alaska, the several states of the Union and the foreign countries hereinbefore named, and in particular to the cities of Seattle, Washington, and San Francisco, California.

X.

That on or about the year 1905, at the said Town of Fairbanks, in the said Territory of Alaska, the directors of said the Washington Company, the said First National Bank of Fairbanks, and the copartnership known as The Fairbanks Banking Company (which thereafter became the Nevada Company, as hereinbefore set forth), by and through their respective boards of directors, officers and managers, secretly, unlawfully and in violation of Section 3 of the Act of Congress of July 2, 1890 (commonly known and called the “Sherman Anti-Trust Act”),

agreed, combined and conspired together to restrain trade and commerce in the Territory of Alaska and between said Territory and the several states of the Union and between said Territory and foreign nations, in this, to wit: The board of directors, managers and officers of the said three banks [8] then and there secretly agreed together and with one another to conduct their said three several banking businesses noncompetitively, and, in order to effect and secure such noncompetitive conduct thereof, the board of directors of each of said three banks, by its managing officer, then and there entered into an agreement in the words and figures following, to wit:

“Fairbanks, Alaska, June 6, 1905.

The undersigned Banks hereby agree as follows:

First: The charges for exchange upon drafts shall be one per cent.

Second: The charges for telegraphic transfers outside, shall be three per cent on sums up to five hundred dollars, and two per cent on sums of five hundred dollars and upwards, plus cost of telegram, provided, that the charge for any sum less than five hundred dollars shall not exceed ten dollars plus the cost of telegram: And, provided, further, that on telegraphic transfers by one customer in one year of one hundred thousand dollars or over, there may be allowed and credited to said customer a rebate of one-half of one per cent.

For telegraphic transfers to Dawson, Valdez and Nome, two per cent on all sums.

Third: The charges for handling gold-dust shall be as follows:

Transportation and insurance on sums less than one thousand dollars, two and one-half per cent; on sums less than five thousand dollars and over one thousand dollars, shall be two and a quarter per cent; on sums over five thousand dollars two per cent; bank charges in addition to above charges for transportation and insurance, two per cent on all sums.

These charges to be based on assay value of gold and do not include exchange where the seller requires payment on the outside. Not less than ten dollars charged for assaying should be made for any sum less than one thousand dollars.

Fourth: Collection charges: Drafts with bill of lading attached, one per cent exchange plus one-half of one per cent collection charges.

Fifth: Each bank party hereto agrees to bring in at once three thousand five hundred dollars in silver coin. [9]

Sixth: Banking hours shall be from ten A. M. to four P. M., provided, that on Saturdays and other days deposits and urgent business may be attended to out of hours.

Seventh: Interest on loans, whether notes, overdrafts, or otherwise shall not be less than three per cent per month.

Eighth: No interest shall be allowed on deposits.

Ninth: Any one of the contracting parties hereto may terminate this agreement upon giving to the others thirty days' notice, and at the expiration of such said thirty days this agreement shall be at an end and the deposits hereinafter referred to shall be returned to the parties depositing the same respec-

tively: Provided, no violation has occurred to forfeit the same.

Tenth: Each of the contracting parties agrees to deposit with EDWARD J. STIER, in the town of Fairbanks, its certified check for five thousand dollars, and upon violation of any of the provisions of this agreement by any of the contracting parties, and due proof thereof made to EDWARD J. STIER, the check of the bank offending shall be cashed and the proceeds delivered to the other bank or banks not in default, and the offending member shall not thereafter be entitled to any benefit or privilege hereunder.

Eleventh: Any one of the contracting parties may request of either or both of the others, an advance of currency to the extent of ten thousand dollars in any one business day, and the party so requested, if its resources of currency so permit, shall advance the same against bill of exchange on the Seattle correspondent of the requesting bank at two per cent discount, provided, that the bank making the advance may require shipping receipt of gold-dust as collateral to such exchange; and provided, further, that if any bank refuses to advance the currency required, then this agreement may be terminated as set forth in paragraph nine hereof, but there shall be no forfeiture of the five thousand dollars deposited as mentioned in paragraph eleven hereof for any violation of this clause.

The Fairbanks Banking Company have a single customer with whom it has heretofore agreed to a lesser rate of interest on overdrafts than is above set forth, and the said Company shall not be in de-

fault under this agreement on account of such single customer.

Twelfth: A signed copy of this agreement shall be held by each of the contracting parties, and a copy also left with said EDWARD J. STIER. [10]

IN WITNESS WHEREOF, the parties hereto have signed.

FAIRBANKS BANKING CO. (Seal)

E. T. BARNETTE.

WASHINGTON-ALASKA BANK (Seal)

By W. H. PARSONS, Mgr.,

FIRST NATIONAL BANK. (Seal)

By LUTHER C. HAAS,

Cashier."

XI.

That the agreement, combination and conspiracy aforesaid, entered into on the date set forth in said written agreement was continued up to and including January 4, 1911; that when the said Nevada Company was organized as a corporation and commenced business, as aforesaid, under the name of The Fairbanks Banking Company, it also entered into and continued in the said unlawful agreement, combination and conspiracy in the place of the said copartnership theretofore carrying on business under the firm name and style of The Fairbanks Banking Company; that during all of said time the said schedule of rates and charges set forth in said agreement was unreasonably high and grossly excessive, but was, notwithstanding, substantially observed and enforced by said directors of the said three banks, and each of them; that during all of the times in

the paragraph mentioned, a vast amount of gold was handled, purchased, sold, smelted, assayed and shipped to Seattle, Washington, or San Francisco, California, under the unlawful agreement hereinbefore set forth, and large sums of money were loaned in and about said Tanana Valley, and a great amount of exchange was sold upon banks and other places in Alaska, and upon banks in Seattle, San [11] Francisco, Chicago and New York, and in foreign countries, including all the countries hereinbefore mentioned, and large sums of money and large amounts of credit were transferred by telegraph from the said Town of Fairbanks to other cities and towns in the said Territory of Alaska, and to the said cities of Seattle and San Francisco, and to all other cities or towns in the various states of the United States, and to foreign countries; all of which said business, amounting to many millions of dollars, was done in pursuance of and in compliance with the said agreement to charge, observe and enforce unreasonably high and grossly excessive charges and rates.

XII.

That the plaintiff herein is informed and believes, and therefore charges it as a fact, that for the purpose of rendering said unlawful agreement effective, each of the parties to said agreement deposited with Edward J. Stier, then and there the clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, its certified check for Five Thousand (\$5,000) Dollars as a penalty to be forfeited by any one of said parties violating said agreement hereinbefore set forth.

XIII.

That after entering upon said unlawful agreement, combination and conspiracy, as aforesaid, to wit, on or about the 1st day of May, 1909, the said Nevada Company and the directors, officers and stockholders of the Washington Company, defendants herein, suspected that the First National Bank of Fairbanks was secretly varying from said stipulated rates set forth in said unlawful agreement, and to prevent such variation therefrom and to carry out and effectuate the [12] purposes of said unlawful agreement, combination and conspiracy, the said Nevada Company and the directors, officers and stockholders of the Washington Company, secretly conspiring together, did pretend, on or about the 7th day of May, 1909, to purchase all of the capital stock of the said First National Bank of Fairbanks, and pretended that each of the said corporations had purchased one-half thereof; and in pursuance of said unlawful agreement and conspiracy, said directors of said Washington Company, defendants herein, did unlawfully pay out of the funds of said Washington Company, for one-half of the capital stock of the said First National Bank of Fairbanks, the sum of Sixty-two Thousand, Five Hundred (\$62,500) Dollars, and the said Nevada Company did pay for the remaining one-half of the capital stock of said First National Bank of Fairbanks the sum of Sixty-two Thousand, Five Hundred (\$62,500) Dollars; and thereafter the said Nevada Company and the said directors, stockholders and officers of the said Washington Company, pretending that each of said

corporations had acquired one-half of the said capital stock of the said First National Bank of Fairbanks, controlled the business affairs and conduct of said First National Bank unlawfully; that is to say, that, having obtained the absolute control of the said corporation, they, in pursuance of the combination and conspiracy hereinbefore mentioned, compelled it and its board of directors and officers to enter into an agreement, in the words and figures following, to wit:

“In order to promote a clear understanding and establish a just and equitable basis for the conduct of their business, the parties hereto subscribed have agreed and do hereby agree with each other as follows, to wit:

First: That in the settlement for any gold-dust deposited for assay, wherever it may be melted [13] and assayed, the party receiving the deposit will furnish an Assay Certificate on which it will make a charge to the depositor of at least two and one-half per cent ($2\frac{1}{2}\%$) on the total of values.

Second: All gold will be purchased upon assay with the exception of lots of ten (10) ounces or less in weight, which lots shall be paid for at a price not higher than the assay value of the gold after deducting one per cent (1%) from the present schedule.

Third: That there shall be no premiums, payments, rebates or gratuities allowed and no subterfuge entered into, which might reduce the charges made on gold-dust deposited for assay below $2\frac{1}{2}\%$ upon the total of values, with the exception of gold-dust produced by the operations of Dave Yarnall and Gus Peterson on the Dome Group, Dome Creek,

Alaska, and the royalties of Barnette, Cook, Ride-nour, McGinn and Sullivan from said Dome Group, which same shall be at nine cents (9¢) per ounce over and above its assay value, as per contract with Fairbanks Banking Company, Fairbanks, Alaska, and gold-dust from No. 17 Below Goldstream known as the James Ground, at a fixed rate of \$18.30 per ounce, cleaned, as per contract, but if contract should be violated from any cause and be thereby terminated, the regular assay rate of two and one-half per cent (2½%) to govern.

Fourth: That upon the deposit of gold-dust for assay with any one of the parties to this agreement, the depositor shall have advanced to his credit an amount not greater than sixteen dollars (\$16.00) per ounce, and no further advance or credit shall be made until the assay has been completed; in the event that an amount greater than net assay value may have been advanced upon deposit, the deficit shall be debited to the account of the depositor.

Fifth: (a) That wherever in this agreement the words 'Private party' or 'private parties' may occur they shall mean and include all parties excepting the subscribers hereto as corporate bodies.

(b) It is agreed that no shipments will be made of any gold-dust or bullion to the outside which is not the property of the parties hereto.

Sixth: That in the purchase of gold-dust over the counter by any of the parties to this agreement where the value of dust offered for sale may be unknown (coming from newly developed creeks or claims), the value shall be determined as soon as

practicable and the value so determined shall be given to all parties interested in this agreement for their guidance in future purchases.

Seventh: (a) That the parties hereto shall close or cause to be closed on May 31st, 1909, all [14] Branch Offices, Agencies or depositories for gold, currency, etc., of any nature whatsoever, now existing or in contemplation.

(b) That no Branch Office, Agency or Depository will be opened by any of the parties hereto; that no officer, director or partner shall participate in or in any manner whatsoever enter into or promote an establishment of any kind whatsoever than that above mentioned, so long as they remain with any of the institutions subscribed hereto, which would in any manner conflict with the banking business as established by the parties hereto, on any creek now developed, or on any new creek or creeks that may be developed within a radius of three hundred miles of Fairbanks.

(c) That no Officer, Director or Agent, or any party whatsoever, shall solicit on the creeks for the benefit of any one of the interested parties subscribed hereto. Each party to this agreement may, however, employ a collector to look after the collection of any amount due it or them in order to protect itself against loss, and such collector may receive and bring to the Bank all gold-dust taken from said parties, but from none others; it being the intent and agreement not to assist in cleaning-up, accept, solicit or deliver any gold-dust except such as above stated in this paragraph.

Eighth: That no funds or credits will be furnished by any of the subscribers to any private party for the purchase of gold-dust.

Ninth: All records connected with any transaction in the gold-dust department, shall be submitted for inspection, upon request of any subscriber to this agreement.

Tenth: The minimum charge for interest on any new loan made after this date shall be Two per cent (2%) per month, except in amounts of Ten Thousand Dollars or over, on which one and one-half per cent (1½%) may be charged.

Eleventh: The rate of exchange upon drafts made by any one of the subscribers upon outside banks, shall be Twenty-five cents (25¢) per One Hundred Dollars, with the exception that upon Foreign Banks a charge on One Per Cent (1%) will be made.

Twelfth: A charge will be made on telegraphic transfers to the outside as follows:

1% On amounts of \$1000 or more,

2% On amounts of \$500 or less.

On amounts in excess of \$500 and under \$1000, the charge shall be \$10; the cost of telegram to be added to the foregoing rates.

The only exception to this rate will be: [15]
Northern Commercial Company, Fairbanks, Alaska.

On drafts or telegraphic transfers made by outside correspondence payable through either of the parties hereto, a charge will be made of one per cent (1%) on drafts and one and one-half per cent (1½%) on telegraphic transfers by the said outside

correspondents and each party hereto will notify all outside correspondents to make such rates.

Thirteenth: (a) On drafts received from the outside for collection a charge of three-quarters per cent ($\frac{3}{4}\%$) will be made on all such collected. All checks or cash items received from other than the correspondents to be remitted for at the rate charged for exchange on drafts to the outside.

(b) All collections except checks and cash items received from outside banks or private parties will be remitted for by draft, unless advised by the forwarding Bank or party that payment be made by wire, in which event the regular rate for telegraphic transfer plus $\frac{1}{2}\%$ shall be charged.

Fourteenth: Out of Town items presented for payment or credit by depositors will be taken at par; from all others an exchange rate equal to the telegraphic transfer exchange rate will be made therefor.

Fifteenth: No interest will be paid on any open account subject to check, and no rate in excess of four per cent (4%) per annum will be made on Savings deposits or Time Certificates of Deposit; all deposits must remain six months to draw interest.

Sixteenth: All outside exchange or currency furnished by one Bank to another, at the request of the latter, to be paid for at an exchange rate of One per cent (1%).

Seventeenth: That this agreement may be terminated upon the establishment of another institution or in case of competition in the purchase of

gold-dust, and shall terminate automatically December 31st, 1909.

Eighteenth: This agreement shall be binding upon the parties hereto subscribed and upon any Association, Institution or Syndicate now existing or that may be hereafter formed with which any officer or Director or any one of these subscribers may be in any way connected.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 10 day of May, 1909.

WASHINGTON ALASKA BANK.

By W. H. PARSONS, Mgr.

FAIRBANKS BANKING COMPANY,

By E. T. BARNETTE.

THE FIRST NATIONAL BANK.

By C. J. HURLEY.

Witnesses:

B. R. DUSENBURY.

F. E. BARFOUR. [16]

The following named places are hereby designated and agreed to as depositories by the undersigned, and this Memorandum is hereby made a part of agreement dated May 10th, 1909, signed by the parties hereto:

CHATANIKA: Fairbanks Banking Co. Branch.

Washington Alaska Bank Branch.

A. E. Eaton, for First National
Bank.

(Receiving and Paying)

CLEARY CITY: C. C. C. CO., for First National
Bank.

For George Moore.

(Receiving only)

LITTLE ELDORADO: Cody & Davis for

Washington Alaska Bank.

First National Bank.

Fairbanks Banking Co.

(Receiving only)

DOME CITY: Washington Alaska Bank Branch.

George C. Thomas for

First National Bank.

Horr & Chiles for

Fairbanks Banking Company.

(Receiving and Paying)

FAIRBANKS CREEK: Herman Wobber or

George Wilson for

Washington Alaska Bank.

First National Bank.

Fairbanks Banking Co.

(Receiving and Paying)

FOX: Chesley & Ryan for

First National Bank.

Horr & Chilee for

Washington Alaska Bank.

E. Aubert for

Fairbanks Banking Co.

(Receiving and Paying)

Dated at Fairbanks, Alaska, the 16th day of June, 1909.

WASHINGTON ALASKA BANK.

By W. H. PARSONS,
Manager.

FAIRBANKS BANKING COMPANY.

By JAMES W. HILL,
V.-President.

FIRST NATIONAL BANK.

By C. J. HURLEY,
President. [17]

XIV.

On the 10th day of May, 1909, the directors, stockholders and officers of the Washington Company, pretending that said company was the owner of and controlled one-half of the stock of the First National Bank of Fairbanks, and said Washington Company in fact controlling one-half of the stock of said First National Bank, and the Nevada Company pretending to own and control, and in fact controlling the other one-half of the stock of the First National Bank of Fairbanks, did, secretly and in pursuance of the conspiracy as hereinbefore set forth, further conspire together and enter into an illegal agreement, which said agreement is in the words and figures following, to wit:

“THIS AGREEMENT made and entered into by and between the FAIRBANKS BANKING COMPANY, of Fairbanks, Alaska, and the WASHINGTON ALASKA BANK, of Fairbanks, Alaska, both corporations doing business under a charter in the town of Fairbanks, Alaska, WITNESSETH:

It is hereby agreed that commencing on the 10th day of May, 1909, and terminating December 31st, 1909, that one and one-half per cent ($1\frac{1}{2}\%$) of the two and one-half per cent ($2\frac{1}{2}\%$) charged upon the purchase of all dust handled will be divided equally between the parties hereto, with the exception of that handled from Gus Peterson and Dave Yarnall from their operations on the Dome Group, Dome Creek, Alaska, and of that from the royalties from said Dome Group, upon which the basis of division of profits will be nine cents (9ϕ) less per ounce than the two and one-half per cent ($2\frac{1}{2}\%$) charged on dust, and with the exception of that handled from No. 17 Below Goldstream upon which the division of profit will be, the difference between eighteen dollars and thirty cents (\$18.30) per ounce, and the average value per ounce for the season 1909, less per ounce than the two and one-half per cent ($2\frac{1}{2}\%$) charge on dust.

It is further understood and agreed that the Washington Alaska Bank shall have the right to handle an equal amount of any Gold-dust as the Fairbanks Banking Company does from the Dome Group, as above mentioned, at the same basis rate, that is, at nine cents (9ϕ) less than assay value less two and one-half per cent ($2\frac{1}{2}\%$). [18]

And it is further understood and agreed that the Fairbanks Banking Company shall have the right to handle the same amount of any dust as the Washington Alaska Bank does from No. 17 Below Goldstream, less the amount handled by said Fairbanks

Banking Company from the same claim, at the same basis rate, that is at a rate of approximately nineteen cents (19¢) (if according to average for 1909), less than the assay value less two and one-half per cent (2½%), except as may be stipulated in contract between the Fairbanks Banking Company, Washington Alaska Bank and The First National Bank, all of Fairbanks, Alaska, of even date herewith.

Dated at Fairbanks, Alaska, this 10th day of May, 1909.

WASHINGTON ALASKA BANK.

By W. H. PARSONS.

FAIRBANKS BANKING COMPANY.

By E. T. BARNETTE.

In the presence of:

B. R. DUSENBURY."

XV.

That while the directors, stockholders and officers of the said Washington Company, defendants herein, and the said Nevada Company were conducting and carrying on a banking business in pursuance of said unlawful combination and conspiracy in restraint of trade and commerce, they, on or about the 13th day of September, 1909, agreed together, in order to effect the absolute concentration and to obtain the absolute control of the banking business in the Town of Fairbanks, the Tanana Valley and the country adjacent thereto, and in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce, that the stockholders and directors of the said Washington

Company should sell to the Nevada Company all of the capital stock and all the assets of the said Washington Company, and that said Nevada Company should purchase from the stockholders and directors of the said Washington Company all said capital stock and assets, and that the said directors, stockholders [19] and officers of said Washington Company should compel the said Washington Company to deliver to the Nevada Company their trust and offices as directors and all the moneys, property and assets, whatsoever, of said Washington Company, together with one-half of the capital stock of the First National Bank of Fairbanks then and there under the control and pretended ownership of said Washington Company, the remaining one-half of the capital stock of the First National Bank being then and there under the control of the Nevada Company; and, accordingly, on or about the date last named, and in pursuance of said combination and conspiracy in restraint of trade and commerce, the board of directors of the Nevada Company made and caused to be entered on the corporate books of said Nevada Company the following resolution, which is in the words and figures following, to wit:

“MINUTES OF THE MEETING OF THE
BOARD OF DIRECTORS OF THE FAIR-
BANKS BANKING COMPANY.

Fairbanks, Alaska, September 13, 1909.

The regular monthly meeting of the Board of Directors of the Fairbanks Banking Company was held at the office of the corporation, Fairbanks, Alaska, at 9:30 P. M.

E. T. Barnette, President, presiding, and B. R. Dusenbury, Secretary, present.

MEMBERS PRESENT:

J. A. Jesson;

Charles J. Robinson;

Dave Yarnall;

E. T. Barnette;

James W. Hill;

L. N. Jesson, Second Vice-President, was also present, * * *

E. T. Barnette, President, explained to the Board the negotiations that were under way for the purchase of the Washington-Alaska Bank for \$250,000.-00. As the matter had been discussed informally with different members of the Board prior to the meeting, after [20] a brief discussion at this time, it was moved by Hill, seconded by Yarnall, that the Fairbanks Banking Company purchase the stock of the Washington-Alaska Bank at a net figure of \$250,000.00. Motion carried.

B. R. DUSENBURY,

Secretary.

Approved 10/12/09.”

“MINUTES OF THE MEETING OF THE
BOARD OF DIRECTORS OF THE FAIR-
BANKS BANKING COMPANY.

Fairbanks, Alaska, September 14, 1909.

Pursuant to adjournment, meeting of the Board of Directors of the Fairbanks Banking Company was held at the office of the corporation at Fairbanks, Alaska, at 8 P. M.

E. T. Barnette, President, presiding and B. R. Dusenbury, Secretary, present.

MEMBERS PRESENT:

J. A. Jesson;

C. J. Robinson;

James W. Hill;

Dave Yarnall;

E. T. Barnette;

John L. McGinn;

L. N. Jesson, 2d Vice-President, was also present.

The action of the Board regarding the purchase of the Washington-Alaska Bank, as had at its meeting September 13, 1909, was confirmed. * * *

B. R. DUSENBURY.

Approved 10/12/09."

XVI.

That thereafter the defendants W. H. Parsons, Falcon Joslin, John Schram, E. L. Webster, J. W. Clise, F. E. Barbour and the Washington Securities Company, a corporation, [21] pretended to sell, transfer and assign unto the Nevada Company all of their shares of stock, being all of the stock of the Washington Company, which said pretended sale, transfer and assignment was evidenced by the following writing, in the words and figures following to wit:

"For value received, ——— hereby sell, assign and transfer unto the Fairbanks Banking Company, Fairbanks, Alaska, ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ——— to transfer

on said books of the within named corporation with full power of substitution in the premises.

Dated, September —, 1909.”

That in pursuance of said agreement, each of the said stockholders signed their names, respectively, to their respective certificates of said shares of the capital stock of the said Washington Company, and on said date the Nevada Company caused a telegraphic transfer to be made in the sum of One Hundred Twenty-five Thousand (\$125,000.00) Dollars, to be paid to the Washington Trust Company, a corporation, for the defendants John Schram, J. W. Clise, Falcon Joslin, E. L. Webster, W. H. Parsons, F. E. Barbour and the Washington Securities Company, a corporation, which said sum was duly paid to said defendants, and upon the delivery of their said stock to the agent of said Nevada Company, the further sum of One Hundred Twenty-five Thousand (\$125,000.00) Dollars was placed by the order and direction of the Nevada Company in the banking house of the Washington Company pending the delivery by said John Schram, E. L. Webster, W. H. Parsons, Falcon Joslin, F. E. Barbour, J. W. Clise and the Washington Securities Company of their said stock, under a certain agreement in writing, which is in the words and figures as follows to wit: [22]

“Fairbanks, Alaska, September 16th, 1909.

RECEIVED OF Fairbanks Banking Company, Fairbanks, Alaska, the sum of One Hundred and Twenty-five Thousand Dollars (\$125,000) in trust to be held by us pending the delivery by W. H. Parsons,

of the Washington-Alaska Bank, of Certificates of Stock covering three hundred and seventy-five (375) shares of the capital stock of the Washington-Alaska Bank, Fairbanks, Alaska, properly endorsed, and pending the receipt by the Fairbanks Banking Company, Fairbanks, Alaska, of telegraphic advice from National Bank of Commerce, Seattle, Washington, of the delivery to them by the Washington Trust Company, of Seattle, Washington, of Certificates of Stock covering Eleven hundred and twenty-five (1125) shares of the Capital Stock of the Washington Alaska Bank properly endorsed. When notified by the Fairbanks Banking Company that such advice has been received the Washington-Alaska Bank is to deliver the said Certificates of Stock covering three hundred and seventy-five (375) shares of the Capital Stock of the Washington-Alaska Bank to the Fairbanks Banking Company and is to pay W. H. Parsons the sum of one hundred and twenty-five thousand dollars (\$125,000.00).

WASHINGTON-ALASKA BANK, FAIR-
BANKS, ALASKA,

By GEO. B. MIRCH,
Asst. Cashier.

The above arrangement is satisfactory.

FAIRBANKS BANKING COMPANY,

By B. R. DUSENBURY,
V. P.

W. H. PARSONS."

XVII.

That thereafter, and upon said payment, aggregating Two Hundred Fifty Thousand (\$250,000) Dol-

lars, having been made, the directors of said Washington Company, in pursuance of said unlawful agreement, combination and conspiracy in restraint of trade and commerce, entered into an agreement with the Nevada Company, by and through E. T. Barnette, its president and manager, which agreement is in the words and figures following to wit:

“THIS AGREEMENT made and entered into this 18th day of September, 1909, by and between the Washington-Alaska Bank, a corporation organized [23] under the Laws of the State of Washington, W. H. Parsons, Falcon Joslin, E. L. Webster, and F. E. Barbour, parties of the first part, and E. T. Barnette, of Fairbanks, Alaska, party of the second part, WITNESSETH:

THAT WHEREAS the Fairbanks Banking Company has purchased the entire capital stock of the Washington-Alaska Bank, a corporation organized and existing under and by virtue of the Laws of the State of Washington, and engaged in the business of banking in the City of Fairbanks or adjacent creeks, Territory of Alaska;

AND WHEREAS as a part of the consideration of said transfer and as an inducement to the said Fairbanks Banking Company to purchase said stock and said banking institution, the said parties of the first part and each and all of them, have promised and agreed to and with the party of the second part, that they or either of them will not engage in the banking business in the City of Fairbanks or adjacent creeks, Territory of Alaska, for a period of five years from the date hereof, either as owners,

agents, servants or employees of any banking institution, and that they or either of them will not organize or promote the organization of any corporation to engage in the banking business in said City of Fairbanks or adjacent creeks for said period, and that they will not become the stockholder of any corporation or stock company organized for the purpose of carrying on banking in said City of Fairbanks or adjacent creek, or become a party to any partnership organized for the carrying on of said banking business at said place within the period above specified, or engage in the banking business in any way as a stockholder of any corporation or stock company or member of a copartnership, or as a manager, agent or employee of any such banking institution;

AND WHEREAS it is desired that said agreement be reduced to writing;

NOW, THEREFORE, the parties of the first part for and in consideration of the sum of One Dollar, and other good and valuable considerations to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in consideration of said Fairbanks Banking Company purchasing the entire stock of said Washington-Alaska Bank and the property of said corporation, DO HEREBY PROMISE, COVENANT AND AGREE to and with the said party of the second part not to *gag*e in the business of banking in any way in the city of Fairbanks or adjacent creeks, Territory of Alaska, for a period of five years from the date hereof, and that they will not promote the organization of or organize any corporation or stock company

for the purpose of carrying on banking business within said City of Fairbanks or adjacent creeks, for a period of five years, or become a member of a [24] partnership organized for said purpose or become a member of any partnership that may be engaged in banking in said place within said time, and that they will not, as manager, agent or employee, engage in any way in the banking business within said time and place; it being the intention of this agreement that in consideration of said transfer above mentioned, said parties of the first part shall not in any way or in any capacity, be connected with any banking institution within said city of Fairbanks or adjacent creeks, within a period of five years from the date hereof.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals this the day and year first above written.

By _____,

FALCON JOSLIN.

E. L. WEBSTER.

F. E. BARBOUR.

W. H. PARSONS.

In the presence of:

_____.

United States of America,
District of Alaska,—ss.

THIS IS TO CERTIFY that before me, a Notary Public in and for the District of Alaska, appeared the Washington-Alaska Bank, a corporation duly organized and existing under and by virtue of the

Laws of the State of Washington, by and through ———, said ——— being personally known to me and also personally known to me to be the ——— of said corporation; and said Washington-Alaska Bank acknowledged to me that it executed the foregoing instrument freely and voluntarily for the uses and purposes therein specified; and also appeared before me W. H. Parsons, Falcon Joslin, E. L. Webster and F. E. Barbour, to me well and truly known to be the individuals described in and who executed the foregoing instrument, and each for himself and not one for the other acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein specified.

WITNESS MY HAND AND OFFICIAL SEAL
at Fairbanks, Alaska, this ——— day of September,
1909.

Notary Public for Alaska.” [25]

XVIII.

That on said 16th day of September, 1909, and for a long time prior thereto, the said Nevada Company was insolvent, its liabilities on said 16th day of September, 1909, exceeding its assets in the amount of Five Hundred Thirty-five Thousand (\$535,000) Dollars, and that said sum of Two Hundred Fifty Thousand (\$250,000) Dollars was paid to the defendants herein out of the moneys and funds of the depositors and creditors of said Nevada Company, all of which the defendants herein, and each of them, then and there well knew.

XIX.

That the condition of said Washington Company on said 16th day of September, 1909, was as follows: It had received in the usual course of business and had on hand a large sum of money from various depositors, to wit, the sum of One Million Eight Hundred Forty-eight Thousand Twenty-seven and 72/100 (\$1,848,027.72) Dollars, which said sum was payable on demand to a large number of depositors; it had in outstanding circulation, under the form of scrip, the sum of Ninety-four (\$94) Dollars; it had on hand in alleged unpaid declared dividend amounting to Four Thousand Five Hundred (\$4,500) Dollars; its outstanding capital stock was of the par value of One Hundred Fifty Thousand (\$150,000) Dollars; its assets amounted to One Million Nine Hundred Sixty-three Thousand Six Hundred Eighteen and 06/100 (\$1,963,618.06) Dollars. That though its capital stock did not possess a value in excess of the sum of One Hundred Ten Thousand (\$110,000) Dollars, yet there was at said time sufficient assets to pay, liquidate or satisfy, [26] in full, all the demands of its depositors and creditors; that the difference of One Hundred Forty Thousand (\$140,000) Dollars between the true value of the capital stock of said Washington Company and the Two Hundred Fifty Thousand (\$250,000) Dollars paid therefor was declared by the defendants to be a bonus, but in truth and in fact was an advance of the future unlawful profits, and the share of the defendants therein, to be made by the Nevada Company, for the benefit of all parties to said agreement,

out of the unlawful agreement and combination in restraint of trade and commerce, hereinbefore set forth, and was paid by said Nevada Company out of the funds of its depositors, as aforesaid, to the directors and stockholders of said Washington Company as such directors' and stockholders' share of such unlawful profits in advance, as defendants herein, and each of them, then and there well knew.

XX.

That in pursuance of said combination and conspiracy in restraint of trade and commerce, and said pretended sale and purchase, and on or about the 22d day of January, 1910, the directors and stockholders of said Washington Company agreed with the Nevada Company to perfect, and did perfect, the said unlawful combination in restraint of trade and commerce by causing the directors of said Washington Company to surrender, by instrument in writing, their offices as directors of said Washington Company to a board of directors designated, selected and controlled by said Nevada Company, and by surrendering to such board of directors the control and management of said Washington Company for the purpose of restraint of trade and commerce, as aforesaid; that thereafter, and at all times up to and including the 4th day of January [27] 1911, the said board of directors so designated, selected and controlled as aforesaid by said Nevada Company, and the officers selected by said last-named board of directors, did conduct and operate said Washington Company in the manner following, to wit: by and through the said board of directors and officers so

selected, designated and controlled, as aforesaid, by said Nevada Company until the 1st day of October, 1910, and thereafter and at all times down to the 4th day of January, 1911, as a pretended consolidated corporation composed of the two corporations, namely, the Washington Company and the Nevada Company, as will be hereinafter more particularly alleged; that the said Nevada Company, in pursuance of said unlawful conspiracy and combination in restraint of trade and commerce hereinbefore set forth, so conducted and operated said Washington Company during all of said times from September, 1909, until January 4, 1911, solely with a view to the welfare, advantage, and benefit of the said Nevada Company and of its directors and stockholders, and without any regard whatsoever for the rights or welfare of the said Washington Company or its depositors and creditors, and without making any provision for the payment and satisfaction of the creditors of said Washington Company, but, on the contrary, with the view, object, intent and result of suppressing the competitive power and force of said Washington Company, and its entity, in violation of law; and in pursuance of said policy and of said unlawful agreement, combination and conspiracy, and as a result of the control of the Washington Company given and obtained as aforesaid, said Nevada Company, with the knowledge and consent of the defendants herein, and each of them, took from the said Washington Company all of its assets and dissipated, wasted and converted the same, which assets have [28] never been, in part or in whole, repaid or restored to the said Washington Company.

XXI.

That on or about the 1st day of October, 1910, at the Town of Fairbanks, in the Territory of Alaska, the officers and directors of the said Nevada Company and the directors and officers so selected and designated, as aforesaid, by the Nevada Company as the officers and directors of the said Washington Company, with the knowledge and consent of the defendants herein, falsely and fraudulently pretended to consolidate the said Nevada Company with the said Washington Company, and then and there caused a physical commingling of the movable property, effects and assets of said two banks, and the occupation of the same office by said two banks, and the conduct of the business of the said two banks at all times thereafter, as the business apparently of one consolidated or merged corporation, and represented and announced to the creditors and depositors of both of said banks, and to the public generally, then and at all times thereafter, that the said two banks were then and there in fact and in law consolidated, whereas, in truth and in fact, as the defendants herein, and each of them, well knew, the said two banks were not then and there, or at any time whatsoever, lawfully consolidated, or at all; that the said Nevada Company on or about the 8th day of October, 1910, to the knowledge and with the consent of the defendants herein, changed its name to the Washington-Alaska Bank for the purpose of deceiving the depositors and creditors of said Washington Company and the public generally; that at all times after the securing of control over the said Washing-

ton Company [29] in September, 1909, as aforesaid, by the said Nevada Company, the said Nevada Company, by the acquiescence of and with the approval and consent of the defendants herein, and each of them, absolutely controlled the said Washington Company and all its assets; that the said Nevada Company, by means of the acquiescence and consent of the defendants herein, and each of them, was at the time of the said pretended consolidation, and at all times thereafter, except as hereinafter alleged, enabled to deceive and did deceive the creditors and depositors of said Nevada Company, the creditors and depositors of the Washington Company and the public generally, into believing that there had been and was a lawful consolidation of the said banks, and that none of the assets of the said Nevada Company or of the said Washington Company had been withdrawn; that such belief was caused by virtue of the control over the said Washington Company delivered and given, as aforesaid, to the said Nevada Company in pursuance of the said unlawful agreement, combination and conspiracy in restraint of trade and commerce between the defendants herein and the said Nevada Company.

XXII.

That on the 4th day of January, 1911, the said Nevada Company, so conducting the business of itself and of said Washington Company, as aforesaid, closed its doors and ceased to do a banking business; and on the 5th day of January, 1911, in a certain suit entitled "Tanana Valley Railroad Company, a corporation, and John Zug, Plaintiffs, vs. Washing-

ton-Alaska Bank, a corporation, Defendant," in the District Court for the Territory of Alaska, Fourth Judicial Division, said Court being then and at all times herein mentioned a Superior Court with full equity and common-law [30] powers and having then and there jurisdiction of the parties and of the subject matter of said suit, said cause being numbered 1597 of the civil causes in said court, an order was duly made and entered by said Court appointing a receiver for said Nevada Company and its assets and directing him to preserve and distribute the same as ordered by said Court and granting him full power to collect and, under the orders of said Court, to distribute the assets in Alaska of said Nevada Company; that thereafter, on the 6th day of January, 1911, a coreceiver to said first receiver was appointed by said District Court, with like powers to be exercised jointly; that said receivers, immediately following their said respective appointments, duly qualified as such receivers; that thereafter, on the 12th day of May, 1911, the said receivers, and each of them, resigned their said office as receivers and said resignations were duly accepted by said District Court of Alaska; that on said 12th day of May, 1911, the said F. G. Noyes, plaintiff herein, was, by order of said Court, duly appointed receiver of said defendant in said cause and of all its assets wheresoever situated, with like power and authority equivalent to that exercised by said coreceivers theretofore appointed; and thereupon said Noyes qualified as such receiver under the laws of the Territory of Alaska, and ever since said 12th day of May, 1911, has been

and now is such duly appointed, qualified and acting receiver of the defendant corporation in said cause.

XXIII.

That the creditors and depositors of the said Washington Company and of the said Nevada Company, and the public generally, in said Town of Fairbanks, and in and [31] about said Tanana Valley and country adjacent thereto, and said District Court of the Territory of Alaska, and said receivers, and each of them, and the respective attorneys for said receivers, did not know or have notice, nor did any of them know or have notice, that the said pretended sale of the capital stock of said Washington Company was fraudulent, null and void, nor that said pretended consolidation was likewise fraudulent, null and void, nor that said representations and statements that the Nevada Company and the Washington Company had lawfully consolidated and merged were and that each thereof was absolutely false and fraudulent; that, on the contrary, the said receivers, and each of them, relying upon and believing said representations and statements made as aforesaid, under orders made in said cause No. 1597 of said Court, distributed dividends aggregating Fifty Cents (50¢) on the dollar to the creditors and depositors of the said Washington Company and said Nevada Company, on the erroneous assumption that the creditors of said Washington Company and said Nevada Company were the creditors and depositors of said supposed consolidated and merged corporations; that all of the creditors and depositors of said Nevada Company

and of said Washington Company also relied upon and believed said false and fraudulent representations and statements, and none of the creditors of either of said companies knew that the said pretended consolidation was false or fraudulent, or that Four Hundred Seventy-five Thousand (\$475,000) Dollars of the assets of the alleged consolidated corporations had been withdrawn prior to said alleged merger and consolidation; and that at no time prior to March, 1915, did any creditor, depositor or other person interested in the administration of the assets of the said [32] Washington Company have any notice or knowledge of the existence of said combination and conspiracy to restrain trade and commerce as aforesaid, or any notice or knowledge that said representations and statements and said pretended consolidation were false and fraudulent, except the defendants herein and the said Nevada Company; that in March, 1915, and not prior thereto, said Noyes was advised by counsel, residing and practicing in San Francisco, California, that the laws of Nevada did not, either then or at the time of said pretended purchase and sale of the stock of said Washington Company and of the alleged consolidation, permit of the sale and purchase by a banking corporation organized under the laws of the State of Nevada of the stock of a banking corporation, or of the consolidation of a corporation organized under the laws of the State of Nevada with a corporation organized under the laws of any other State, territory or country; that the said receiver and the creditors and depositors of said Washington

Company were then and there for the first time advised by said counsel that the receivers appointed in said cause No. 1597 were not the receivers of the said Washington Company and its assets in Alaska, and that in consequence no receiver had been lawfully appointed for said Washington Company; that in May, 1915, as a result of the information and advice so received by said receiver and the depositors and creditors of said Washington Company, one of the creditors of the said Washington Company, to wit, J. H. Groves, suing for himself and all other creditors of the said Washington Company, commenced a suit, the same being No. 2113 of the civil causes of said District Court for the Territory of Alaska, Fourth Judicial Division, against the Washington Company and against the said F. G. Noyes, as receiver of the said Nevada Company, [33] who was then and there in possession of the assets and books of account of the Washington Company, under the erroneous belief and assumption that said Washington Company was lawfully consolidated with said Nevada Company; that said last-named suit was entitled "J. H. Groves, Plaintiff, vs. Washington-Alaska Bank, a corporation, and F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation, Defendants"; that thereafter, the said District Court for the Territory of Alaska, Fourth Judicial Division, having jurisdiction of the subject matter and of the parties to said suit, made an order appointing the said F. G. Noyes, who then and there had possession of the assets of said Washington Company under said erroneous belief and assumption as

aforesaid, the receiver of said Washington Company and of all of its assets in Alaska, and authorizing, directing and empowering said F. G. Noyes to retain and take the said assets of the said Washington Company and administer the same under the orders of said Court; and thereupon said F. G. Noyes qualified as such receiver under the laws of the Territory of Alaska, and ever since the month of May, 1915, has been and now is such duly appointed, qualified and acting receiver of said Washington Company; that thereafter on the 27th day of July, 1915, the said District Court for the Territory of Alaska, then and there having jurisdiction of the subject matter and of the parties in said cause No. 2113, duly made and entered an order of reference in said cause, and ordered that testimony be taken, an inquiry be made, all accounts be stated, and all facts be disclosed and found and conclusions of law be made thereon; that in pursuance of said order and in pursuance of a like order made in said cause No. 1597, references were had, testimony was taken, inquiry was duly [34] made, a full list of the creditors and debtors of the said Washington Company was ascertained, and the assets and liabilities of said Washington Company and of the said Nevada Company were segregated and ascertained, respectively; that in the findings of fact and conclusions of law made as ordered in said orders of reference, it was found and concluded, among other things, by the referee appointed in said orders of reference, that the said Washington Company was on January 5, 1911, and at all times thereafter, insolvent, and

that said pretended sale of stock and consolidation was unlawful, fraudulent, null and void; that thereafter, and on the 24th and 30th days of July, 1915, respectively, the said District Court for the Territory of Alaska, Fourth Judicial Division, duly made and entered decrees in said causes numbered 1597 and 2113, respectively, approving and adopting as its own the said findings and conclusions of said referee; that in the course of said accounting made by said referee, as aforesaid, it first became known to said F. G. Noyes and to the creditors and depositors of said Washington Company that the said agreement, combination and conspiracy to restrain trade and commerce in the Territory of Alaska, and between said Territory and the several States of the Union, and between said Territory and foreign countries, had been entered into and perfected; that likewise in said accounting it first became known to said F. G. Noyes, receiver of said Washington Company, and to the creditors and depositors of said Washington Company that the said Nevada Company had, in violation of the laws and statutes made and provided by the State of Washington, the State of Nevada and the United States of America, unlawfully combined and conspired with the defendants herein to purchase the stock and assets of [35] said Washington Company and to appropriate and waste said assets as aforesaid; that from the said creditors of said Washington Company and from all persons interested in the administration of its assets, except said conspirators, including these defendants, all knowledge and notice of said combination and

conspiracy in restraint of trade and commerce and of the fraudulent and unlawful character of said pretended consolidation and of the fraudulent appropriation by the Nevada Company of the Washington Company's assets, as aforesaid, were concealed by means of said false and fraudulent statements, representations and acts of the defendants and their said co-conspirators, and by the nature of said fraud, until information aforesaid was obtained in San Francisco in the month of March, 1915, and until said accounting was taken as hereinbefore set forth.

XXIV.

That on the 8th day of September, 1915, in an action pending in the Superior Court of the State of Washington in and for King County, wherein Elizabeth Smart is plaintiff and the said Washington-Alaska Bank, a Washington corporation, is defendant, the said Court having jurisdiction of the parties to said action and of the subject matter thereof, the said F. G. Noyes, aforesaid, was by said Court duly appointed receiver of said corporation and by order of said Court authorized to take the assets of said corporation within the State of Washington and to proceed to collect, demand and enforce any and all choses in action in favor of said corporation existing within the State of Washington; and the said F. G. Noyes has duly qualified as such receiver under the laws of the State of Washington, and ever since said time has been and now is the receiver of said corporation [36] within the State of Washington and entitled to its assets and property within the State.

XXV.

In the said accounting hereinbefore mentioned, and after the assets and liabilities of the Washington Company and of the Nevada Company had been segregated and ascertained, respectively, and in the findings of fact and conclusions of law so made by the referee, as aforesaid, in pursuance of said order of reference, which said findings and conclusions were adopted by the Court as aforesaid, it was found and concluded that, after all due credits had been given, the said Nevada Company was and is insolvent and indebted to its creditors in the sum of Two Hundred Eighty-three Thousand Six Hundred Seventy-five and 84/100 (\$283,675.84) Dollars, together with interest thereon from the 1st day of June, 1915, at the rate of eight (8%) per cent per annum, and that there were and are no other assets of said Nevada Company available to its receiver, and that the said Washington Company was and is insolvent and indebted to its creditors in the sum of Three Hundred Seventy-eight Thousand Nine Hundred Seventy-seven and 73/100 (\$378,977.73) Dollars for principal on the 4th day of January, 1911, when it suspended payment, and for interest upon said sum, computed up to the 1st day of June, 1915, at the rate of eight (8%) per cent per annum, in the sum of One Hundred Thirty-three Thousand Five Hundred Seventy-nine and 45/100 (\$133,579.45) Dollars, being a total of Five Hundred Twelve Thousand Five Hundred Fifty-seven and 17/100 (\$512,557.17) Dollars; that all of the assets of said Washington Company had been realized upon, disposed of and distributed, ex-

cept assets in possession of said F. G. Noyes to the value of Four Thousand Four Hundred Thirty (\$4,430) [37] Dollars, and that there was still due and owing to its creditors, after giving due credit for said sum of Four Thousand Four Hundred Thirty (\$4,430) Dollars, the said sum of Five Hundred Twelve Thousand Five Hundred Fifty-seven and 17/100 (\$512,557.17) Dollars, and that there are no other assets in the Territory of Alaska or elsewhere to pay or liquidate said sum, save and except the statutory liability of the stockholders of said Washington Company, which the plaintiff is unable to collect from the Nevada Company and which the defendants herein have ever refused and now refuse to pay to the plaintiff or to said Washington Company or to its creditors, or at all.

XXVI.

That by reason of and through the unlawful acts of the defendants, as hereinbefore set forth, the Washington Company has been injured in its business and property in the sum of One Hundred Ten Thousand (\$110,000) Dollars, said One Hundred Ten Thousand (\$110,000) Dollars being the surplus over and above its liabilities to creditors, excepting stockholders, which said surplus said Washington Company owned and possessed on or about the 16th day of September, 1909, in the sum of Five Thousand (\$5,000) Dollars, said Five Thousand (\$5,000) Dollars being the loss of the use of said Sixty-two Thousand Five Hundred (\$62,500) Dollars paid by said defendants, as aforesaid, for one-half of the stock of the First National Bank, and in the

sum of Five Hundred Twelve Thousand Five Hundred Fifty-seven and 17/100 (\$512,557.17) Dollars, said Five Hundred Twelve Thousand Five Hundred Fifty-seven and 17/100 (\$512,557.17) Dollars, being the amount necessary to liquidate the obligations of said Washington Company to its depositors.
[38]

XXVII.

Save as hereinbefore averred there never has at any time been any receiver or trustee of said Washington Company clothed with any of the powers hereinbefore set forth as the powers of the plaintiff receiver herein, or at all.

XXVIII.

That the defendant Jane Doe Parsons is and at all the times herein mentioned was the wife of the said defendant W. H. Parsons; that the defendant Jane Doe Joslin is and at all the times herein mentioned was the wife of the said defendant Falcon Joslin; that the defendant Jane Doe Schram is and at all the times herein mentioned was the wife of the said defendant John Schram; that the defendant Jane Doe Webster is and at all the times herein mentioned was the wife of the said defendant E. L. Webster; that the defendant Jane Doe Clise is and at all the times herein mentioned was the wife of the said defendant J. W. Clise; that the defendant Jane Doe Barbour is and at all the times mentioned was the wife of said defendant F. E. Barbour. Said wives are made defendants herein to the end that their respective community property interests may be bound by any judgment or decree made in this suit.

XXIX.

That Fifty Thousand (\$50,000) Dollars is a reasonable sum to be allowed as attorneys' fees in this suit.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, in the sum of One Million Eight [39] Hundred Eighty-two Thousand Six Hundred Seventy-one and 51/100 (\$1,882,671.51) Dollars, together with the sum of Fifty Thousand (\$50,000) Dollars as attorneys' fees, and for his costs and disbursements herein.

de JOURNAL & de JOURNAL,
ROY V. NYE,

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff. [40]

State of Washington,
County of King,—ss.

F. G. Noyes, being first duly sworn, on oath deposes and says:

That he is the duly appointed and qualified receiver of the Washington-Alaska Bank, a corporation organized and existing under and by virtue of the laws of the State of Washington, and of all the assets of said corporation in the said State of Washington, and as such receiver is plaintiff in this case; that he has read the foregoing complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

F. G. NOYES.

Subscribed and sworn to before me this 16th day of December, A. D. 1915.

[Seal]

JOHN P. GARVIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the U. S. District Court,
Western District of Washington, Northern Division.
Jan. 19, 1916. Frank L. Crosby, Clerk. By Ed. M.
Lakin, Deputy. [41]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3223.

F. G. NOYES, as Receiver,

Plaintiff,

vs.

W. H. PARSONS et al.,

Defendants.

Demurrer.

Come now the defendants herein and demur to the complaint upon the ground and for the reasons that it appears upon the face thereof:

1. That the plaintiff has no legal capacity to sue;
2. That there is a defect of parties defendant;
3. That the complaint does not state facts sufficient to constitute a cause of action;
4. That the action has not been commenced within the time limited by law.

CLISE & POE,
PETERS & POWELL,
Attorneys for Defendants.

Service of within Demurrer and receipt of copy thereof admitted this 23d day of March, 1916.

HUGHES, McMICKEN, DOVELL &
RAMSEY,

For Pltf.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Mar. 23, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [42]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS et ux., FALCON JOSLIN et ux.,
JOHN SCHRAM et ux., F. E. BARBOUR
et ux., and WASHINGTON SECURITIES
COMPANY, a Corporation,
Defendants.

Opinion.

Filed June 27, 1916.

ON DEMURRER TO COMPLAINT.**DEMURRER SUSTAINED.**

de JOURNAL & de JOURNAL, ROY V. NYE,
HUGHES, McMICKEN, DOVELL &
RAMSEY, for Plaintiff.

PETERS & POWELL, CLISE & POE, for De-
fendants.

NETERER, District Judge:

This is an action for the recovery of \$1,882,671.51, damages alleged to accrue to plaintiff under Section Seven of the Sherman Act, together with the sum of \$50,000 attorneys' fees. It is alleged, in substance, that on the 24th of February, 1905, the Washington-Alaska Bank, a corporation of the State of Washington, was organized, for the purpose of carrying on a general banking business in the Territory of Alaska. That since said time the First National Bank of Fairbanks, a corporation duly organized under the national banking laws, has been conducting a general banking business in the town of Fairbanks. That from the month of October, 1905, until March, 1908, E. T. Barnette, James Hill, and R. C. Wood, as copartners, conducted a general banking business in the town of Fairbanks under the [43] name of the Fairbanks Banking Company. That on the 21st of January, 1908, the Fairbanks Banking Company was incorporated under the laws of the State of Nevada, and by amendment, on the 8th day of Octo-

ber, 1910, the name of this corporation was changed to Washington-Alaska Bank, and that it took over the banking business of the Fairbanks Banking Company, a copartnership. That all of said banking companies were organized for the purpose of carrying on and conducting a general banking business in the town of Fairbanks, Alaska. That the defendants John Schram, J. W. Clise, Washington Securities Company, F. E. Barbour, Falcon Joslin, and W. H. Parsons, have been stockholders of the Washington-Alaska Bank, the Washington corporation, from its organization, and the defendant E. L. Webster has been a stockholder of said company since September 15, 1906. That John Schram, J. W. Clise, Falcon Joslin, and W. H. Parsons, were directors of said company from its organization, and F. E. Barbour and E. L. Webster since February 3, 1909. That the said three banking corporations were the only banking concerns in the town of Fairbanks, and no other bank was located within three hundred fifty miles of said town, or within six days' travel. That the main industry supporting the town of Fairbanks, the said Tanana Valley and the country surrounding said valley is placer mining. That many millions of dollars of gold was taken from said district annually, and that the said three banks were the only avenues through which the said gold found its way into the markets, and that a large revenue was derived to the banks in issuing domestic and foreign exchange into various parts of the world. It is further alleged that during the year 1905 the said banking companies, "through their respective Boards of Direc-

tors, officers and managers, secretly, unlawfully, and in violation of Section 3 of the Act of Congress of July 2, 1890 (commonly known and called [44] the 'Sherman Anti-Trust Act'), agreed, combined and conspired together to restrain trade and commerce in the Territory of Alaska and between said Territory and the several states of the Union, and between said Territory and foreign nations, in this, to wit: The Board of Directors, managers and officers of the said three banks then and there secretly agreed together and with one another to conduct their said several banking businesses noncompetitively, and in order to effect and secure such noncompetitive conduct thereof, the Board of Directors of each of said three banks, by its managing officer, then and there entered into an agreement," which is set out, in which appears a schedule of charges to be made for exchange, etc., and further alleges, that the "agreement, combination and conspiracy" was continued to and including January 4, 1911; that when the Washington-Alaska Bank, a Nevada corporation, was organized under the name of the Fairbanks Banking Company, it also entered into and continued in the said unlawful agreement, combination and conspiracy in place of the copartnership. It is alleged that during all of the times mentioned "a vast amount of gold was handled, purchased, sold, smelted, assayed and shipped to Seattle, Washington, or San Francisco, California, under the unlawful agreement," etc., "and a great amount of exchange was sold upon banks and other places in Alaska, and upon banks in Seattle, San Francisco, Chicago, and New York,

and in foreign countries.” That for the purpose of insuring the good faith of the parties to carry out such agreement, each party deposited a certified check for \$5,000 as a penalty to be forfeited by any one of the parties violating said agreement. That on the first of May, 1909, the Nevada Company, and the directors, officers and stockholders of the Washington Company, defendants herein, “suspected that the First National Bank of Fairbanks was secretly varying from said stipulated rates set forth in said unlawful agreement, and [45] to prevent such variation therefrom and to carry out and effectuate the purpose of said unlawful agreement, combination and conspiracy * * * did pretend, on or about the 7th of May, 1909, to purchase all of the capital stock of the said First National Bank of Fairbanks, and pretended that each of the said corporations had purchased one-half thereof; and * * * did unlawfully pay out of the funds of said Washington Company, for one-half of the capital stock of the First National Bank of Fairbanks, the sum of \$62,500, and the Nevada Company did pay for the remaining one-half of the capital stock of the First National Bank of Fairbanks, the sum of \$62,500,” and thereafter the officers and directors of said companies controlled the business affairs and conduct of said First National Bank unlawfully, “that is to say, that having obtained the absolute control of said corporation, they, in pursuance of the combination and conspiracy hereinbefore mentioned, compelled it and its board of directors and officers to enter into an agreement,” in writing, which is set out, and in which

certain fixed rates are stipulated to be charged, which agreement is signed by the Washington-Alaska Bank, Fairbanks Banking Company, and the First National Bank, and in attached memoranda certain places were designated as depositories of the said banking companies. It is alleged that on the 10th of May, 1909, the directors, stockholders and officers of the Washington Company and the Nevada Company, each controlling one-half of the stock of the First National Bank of Fairbanks, did, secretly and in pursuance of the conspiracy set out, further conspire together and entered into an illegal agreement, which is set out, in which certain rates for services are fixed. It is then alleged that while the officers of the Washington Company, the defendants herein, and the Nevada Company were conducting and carrying on a banking business pursuant to such unlawful combination and [46] conspiracy, "they, on or about the 13th day of September, 1909, agreed together, in order to effect the absolute concentration and to obtain the absolute control of the banking business of the town of Fairbanks, the Tanana Valley and the country adjacent thereto" that the stockholders and directors of the said Washington Company should sell to the Nevada Company all of the capital stock and all of the assets of the Washington Company, and that said Nevada Company should purchase from the stockholders and directors of the said Washington Company all said capital stock and assets, and that such officers should deliver to the Nevada Company all moneys, properties and assets of the Washington Company, together with one-half of the cap-

ital stock of the First National Bank of Fairbanks, and in pursuance of such arrangement a resolution was passed by the Board of Directors of the Nevada Company, purchasing the capital stock of the Washington Company for \$250,000. That the defendants, Parsons, Joslin, Schram, Webster, Clise, Barbour, and the Washington Securities Company did sell, transfer, and assign to the Nevada Company all their shares of stock, being all of the stock of the Washington Company, and received therefor \$250,000, and “in pursuance of said unlawful agreement, combination and conspiracy in restraint of trade and commerce,” the said defendants entered into an agreement not to engage in the banking business in the City of Fairbanks or adjacent creeks in the Territory of Alaska, for the period of five years. It is then alleged that on the 16th day of September, 1909, and for a long time prior thereto, the Nevada Company was insolvent, and that the money paid to the defendants was paid “out of the moneys and funds of the depositors and creditors of the said Nevada Company, all of which the defendants herein, and each of them, then and there well knew. It is then alleged that the Washington Company was solvent, and “That though its [47] capital stock did not possess a value in excess of the sum of \$110,000, yet there was at said time sufficient assets to pay, liquidate or satisfy in full all of the demands of its depositors and creditors; that the difference of \$140,000 between the true value of the capital stock of said Washington Company and \$250,000 paid therefor was declared by the defendants to be a bonus, but in truth and in

fact was an advance of the future unlawful profits, and the share of the defendants therein to be made by the Nevada Company, for the benefit of all parties to said agreement, out of the unlawful agreement and combination in restraint of trade and commerce." That the directors of the Washington Company surrendered control of the company to the Nevada Company, who assumed control and management thereof, and that the Nevada Company and the Washington Company "falsely and fraudulently pretended to consolidate the said Nevada Company with the said Washington Company, and then and there caused the physical commingling of the movable property, effects and assets of the said two banks, and the occupation of the same office by the said two banks, and the conduct of the business of the said two banks at all times thereafter as the business, apparently, of one consolidated or merged corporation." "That the said Nevada Company, on or about the 8th day of October, 1910, to the knowledge and with the consent of the defendants herein, changed its name to the Washington-Alaska Bank, for the purpose of deceiving the depositors and creditors of the said Washington Company and the public generally," and it is alleged that the belief was general among the public and the creditors that there had been a lawful consolidation of said banks, and that none of the assets of the Nevada Company or of the Washington Company had been withdrawn. It is further alleged that on the 4th day of January, 1911, the Nevada Company closed its doors, and thereafter, in due and legal course, the plaintiff was appointed receiver, and

in the course of administration [48] paid to the creditors of the Washington Company and the Nevada Company, a dividend of fifty per cent. That in March, 1915, plaintiff receiver was advised that the laws of Nevada did not permit the Nevada Company to purchase the stock of the Washington Company, and that the receiver did not have lawful possession of the assets of the Washington Company, and "That in May, 1915, as a result of the information, and advice so received by said receiver and the depositors and creditors of said Washington Company, one of the creditors * * * suing for himself and all other creditors of said Washington Company, commenced a suit * * * against the Washington Company, and against said F. G. Noyes, as receiver of the said Nevada Company, who was then and there in possession of the assets and books of account of the Washington Company, * * * " and "that thereafter the said District Court for the Territory of Alaska, Fourth Judicial District * * * made an order appointing the said F. G. Noyes * * * the Receiver of said Washington Company and of all of its assets in Alaska * * * ," and "that on the 8th day of September, 1915, in an action pending in the Superior Court of the State of Washington in and for King County * * * the said F. G. Noyes * * * was * * * duly appointed receiver of said corporation and authorized to take the assets of said corporation within the State of Washington, and to proceed to collect, demand and enforce any and all choses in action in favor of said corporation existing within the State of Washington." It

is alleged that an accounting was made by the receiver between the Nevada corporation and the Washington corporation, and there is due to the depositors of the Washington corporation the sum of \$512,557.17. It is alleged "that at no time prior to March, 1915, did any creditors, depositors or other persons interested in the administration of the assets of said Washington Company have any notice or knowledge of the existence of said combination and conspiracy to restrain trade and commerce as aforesaid, [49] or any notice or knowledge that said representations and statements and said pretended consolidation were false and fraudulent, except the defendants herein and the said Nevada Company; that in March, 1915, and not prior thereto, said Noyes was advised by counsel residing and practicing in San Francisco, California, that the laws of Nevada did not either then or at the time of said pretended purchase, and sale of the stock of said Washington Company, and of the alleged consolidation, permit of the sale and purchase by a banking corporation organized under the laws of the State of Nevada of the stock of a banking corporation or of the consolidation of a corporation organized under the laws of the State of Nevada with a corporation under the laws of any other State or Territory or country; that the said receiver and the creditors and depositors of the said Washington Company were then and there for the first time advised by said counsel that the receivers * * * were not receivers of said Washington Company and its assets in Alaska, and that in consequence no receiver had been lawfully appointed

by said Washington Company.”

The defendants have demurred to the complaint, among other grounds, for the reason that the complaint does not state facts sufficient to state a cause of action, and that the action was not commenced within the time limited by law. It is contended on the part of the defendants, first, that if the contracts are legal, a cause of action is not stated, because they do not violate the Sherman Anti-Trust Act, and second, if they are illegal, the action cannot be maintained, because the receiver has no greater power than the corporation for whom he acts, and since the bank was a party, it is estopped to claim damages for its wrongdoing.

The plaintiff contends that the corporation is not a party to the suit, and that the real offender is not the corporation, but these defendants. That the defendants' ingenuity [50] conceived the plan and they had the power to execute it, and contend that the act, so far as the corporation is concerned, was *ultra vires*, and beyond the scope and power of the trustee's appointment, and that the defendants cannot be permitted to say that their acts were illegal and beyond their power and yet that the corporation is guilty, and it is sought to draw a distinction between the whole body of the stockholders of the corporation and the corporation itself, so as to place the guilt, if any, upon the stockholders, and still leave the corporate entity guiltless.

The natural tendency of the acts set out show, I think, conclusively, that the acts were corporate acts. All of the agreements and everything done under

them purport to be and were corporate acts. The only act complained of that is not a corporate act is the sale of the shares of stock by the defendants in the Washington corporation. This, it is alleged, was for the purpose of carrying out the unlawful agreement to which the corporation was a party. This, it would seem, was but a part of the scheme. It seems to me, under the allegations and the conduct of all of the parties with relation to the scheme set out, the thought must be kept in mind as stated by the Supreme Court of Ohio, in *State ex rel. Watson vs. Standard Oil Co.*, 30 N. E. 279, "That the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act." Applying this test to the conduct of the parties [51] as set out, it nowhere appears that there was any act which has the earmark of individuality or individual relation, but all of the acts on their face conclusively appear to be the corporate acts, and with that purpose in view. The same Court further said:

"The idea that a corporation may be a separate entity in the sense that it can act independently of the natural persons composing it, *or*

abstain from acting where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of the stockholders, cannot be decisive of the question, and is therefore illogical.” (Italics ours.)

A similar issue was presented in the case of People of New York vs. North River Sugar Refining Company, 9 L. R. A. 33, in which the Court, upon the attempt to differentiate between the corporate entity and the stockholders, said:

“The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter, to adjudge that the former remains pure.”

Again:

“The stockholders, by a unanimous vote, decided to go into the proposed combination, and authorized their committee to agree upon the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee.

It was therefore actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency."

And again:

"If these things had been done lawfully, they would have been accomplished by the united action of the trustees and corporators, and beyond any [52] question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. *To say that would disarm the State in every case of misuse or abuse of chartered powers.*" (Italics ours.)

And the Court held that the claim that the acts complained of were corporate acts "could not be defeated by the assumed innocence of a convenient fiction." What has here been said, I think, is fully sustained by the Court of Appeals of this Circuit, in *Linn & Lane Timber Co. vs. U. S.*, 196 Fed. 593.

The doctrine of *ultra vires* does not shield a corporation from the effects of its wrongful or tortious

conduct. *First National Bank vs. Graham*, 100 U. S. 699; *Salt Lake City vs. Hollister*, 118 U. S. 256.

Has the receiver a right of action where the corporation would have none? Does the appointment of a receiver of a corporation enlarge the scope and benefits which might accrue to the corporation by reason of an action on the part of the receiver? I think it is fundamental that the receiver simply stands in the place and acts instead of and for the corporation. The powers of the corporation are not extended; the rights of the corporation by reason of the appointment are not enlarged. The action by the receiver, while it would inure indirectly to the benefit of creditors if recovery was had, primarily is not an action for the creditors. The receiver does not represent the creditors other than as an arm of the court to receive assets of the corporation and convert them into funds, and disburse them under the order of the Court to the persons who are entitled thereto. There is no allegation in the complaint which in any way connects the creditor and the receiver in any other or different relation. All the stockholders of this corporation, it is alleged, joined the combination. The receiver, then, represents no person who is directly interested who is not a party to the unlawful combination, and [53] as such party to an illegal combination, cannot sue under the Sherman Act for damages which he has suffered. *Bishop vs. American Preserving Co.*, 105 Fed. 845, in which it was said:

“There is another ground that might well be considered as placing the plaintiff without the

purview of said act, to wit, the fact that the plaintiff was himself a party to the unlawful combination and was injured by reason of his illegal connection therewith.”

It may be said that the creditor was damaged by reason of the act of the defendants, in that the defendants were paid \$250,000 from the depositors' money, knowing it to be the depositors' money. It is true that if the defendants had taken \$250,000 of the depositors' money in the Washington Company bank, of which they were directors, and depleted the assets to that extent, that the depositors, if injured by reason thereof, would have a right of recovery; but that is not this case. The action is not for that purpose, and the complaint specifically alleges that the money was paid from the depositors' money of the Nevada Company, and this was known to the defendants. Hence the depositors of the Washington Company, of which the defendants were directors and stockholders, were not injured by this payment.

Many authorities are cited to the effect that the principle *in pari delicto* will not prevent a recovery, but I do not think the cases have application here. Courts will not deny relief to a guilty party if to refuse to do so will result in the accomplishment of the illegal act. But upon the alleged facts in the case at bar, the principle has no application. Nor will the Court lend its aid “because the interest of the public will be best served by punishing those defendants, who alone received the benefits of the transaction,” at the instigation of a private suitor, unless upon presentment by a grand jury. The punish-

ment is prescribed by the act, and parties [54] who are damaged have the right to invoke the provisions of the act, and it is only to such parties that a Court can afford relief. *City of Atlanta vs. Chattanooga Foundry & Pipe Works*, 203 U. S. 390.

In this connection I think it may be stated that while an offense may be charged against the Sherman Act, it does not appear that the Washington Company, of which plaintiff is receiver, was discriminated against and damaged because of the conspiracy. It would appear that the purpose of the conspiracy was against the public and not against either of the corporations, or against any depositor. The object was not to lessen the value of the depositors' security, but rather to enhance it by increasing the earning capacity of the bank, as clearly and fully appears by the allegations of the complaint. The stock of all of the alleged conspirators was placed in the same relation and not in antagonism to any creditor, and the business was operated with a view of enhancing the earnings, and the Washington Company was not depressed nor discriminated against, but was given the business consideration of the conspiring bank which acquired the stock. It does not appear that the failure of the banks, or either of them, was caused by the conspiracy, but rather, in spite of it. I see no application of *Shawnee Compress Co. vs. Anderson*, 209 U. S. 423, nor parallel in *Darius Cole Transportation Co. vs. White Star Line*, 186 Fed. 63 (225 U. S. 704).

I do not believe that the complaint states a cause of action; nor do I think this action was commenced

within the time limited by law. The statute of limitations of Washington is applicable to this case, *Chattanooga Foundry & Pipe Works vs. City of Atlanta, supra*; *Harvey vs. Booth Fisheries Co.*, 228 Fed. 782. I think this case comes within subdivision 6 of Section 159, Remington & Ballinger's Statutes of Washington, which provides that, "An action upon a statute for a penalty or [55] forfeiture, where an action is given to the party aggrieved, or to such party and the State * * * , " shall be commenced within three years. This is clearly an action for a penalty. The plaintiff contends that the liability is created by reason of the written agreements entered into, and therefore the six year statute should obtain. The written agreements are but links in the chain of evidence to establish the wrong upon which the right of recovery is predicated. The recovery is not based upon the written agreements, but upon the statute which gives the right of action. In *Caldwell vs. Hurley*, 41 Wash. 296, the action arose directly out of a written obligation which the party had signed, and in which he obligated himself to pay certain sums of money, and the Court held that "the liability for contribution of appellant and respondent is an implied liability which arose by reason of their becoming cosureties on the note." If they had not entered into the written contract which resulted from their signing the note, at the time, under the circumstances, and for the purpose found by the Court, there would have been no liability. The liability was contractual in its nature, and the direct result of that written agreement by

which respondent was compelled to make the payment for which contribution was sought. In the instant case the only instrument set out in the complaint which was signed by the defendants was the agreement not to engage in the banking business in Fairbanks for five years, of itself not against the policy of the law, and not an obligation which has been violated, nor upon which recovery is predicated. *Chattanooga Foundry & Pipe Works vs. Atlanta*, 203 U. S. 390, does not hold to a different conclusion. The voluminous cases cited have no application to the facts stated in the bill. (*1)

All of the transactions charged in the complaint having transpired more than three years prior to the commencement of the action, all causes of action, if any, accrued at the time [56] of the appointment of the receiver. *Scott vs. Armstrong*, 146 U. S. 499. All of the assets were then in the hands of the Court and being administered, and all facts open to the plaintiff. The fact that a receiver was appointed does not change the status. *Hawkins v. Donnerberg (Oregon)*, 66 Pac. 691; *Bennett vs. Thorne*, 36 Wash.

(*1) *Smith vs. Seattle*, 18 Wash. 484. *Sterrett vs. Northport Mining & Smelting Co.*, 30 Wash. 164. *Brisky vs. Leavenworth*, 68 Wash. 386. *St. Louis & S. F. Ry. Co. vs. Ramsey*, 132 Pac. 478. *Georgia Ry. & Elec. Co. vs. Tompkins*, 75 S. E. 664. *Houston vs. Thorton*, 65 Am. St. 699. *N. State Bank vs. Bremerton*, 86 Wash. 261. *Handly Inv. Co. vs. Trenholm*, 48 Wash. Dec. 537. *Dodd v. Pittsburg*, 106 S. W. 787.

253; *Chilberg vs. Biebenbaum*, 41 Wash. 663; and the fact that creditors may not have had knowledge is immaterial. *Williams et al. vs. Commercial National Bank*, 11 L. R. A. (N. S.) 857.

It is contended by the plaintiff in avoidance of the bar of the statute, that he has set out facts sufficient to avoid the bar (*Stearns vs. Hochbrun*, 24 Wash. 206), and that without further allegations the matter should be left rather a rule of evidence than a rule of pleading, "if it still be the rule that means of discovery is equivalent to actual discovery." In *Dettering vs. Roeder*, filed June 29, 1914, this Court stated:

"The party seeking to avoid the bar of the statute, however, may not do so by general allegations of ignorance on his part, and the rule of pleading is thus laid down in *Wood vs. Carpenter*, 101 U. S. 135, 141, 'In this class of cases the plaintiff is held to stringent rules of pleading, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentations was discovered, and what the discovery is, so that the Court may clearly see whether by ordinary diligence the discovery might not have been made.' *Stearns vs. Page*, 7 How. 819, 829. (Continuing.)

"A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it

was, and how it was made, and why it was not made sooner.”

Hardt vs. Heiweyer, 152 U. S. 547; *Godden vs. Kimmell*, 99 U. S. 201; *Lansdale v. Smith*, 106 U. S. 391; *Hammond vs. Hopkins*, 143 U. S. 224. The allegations of the complaint to avoid the bar are not the want of knowledge of the facts, but rather want of legal information upon the facts. This is not sufficient. The most favorable statement of the rule for those seeking to [57] avoid the bar of the statute is that stated in *Bailey vs. Glover*, 21 Wall. 342, in which the Court, at page 347, said that “where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.” But in the instant case the facts were known and there is no allegation of concealment. In fact, the complaint sets out the transactions at hand, all of which appear to have been in the possession of the plaintiff more than three years prior to the commencement of this action, but seeks to toll the statute because he was not advised of the legal status of the known facts.

The demurrer is sustained.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. June 27, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [58]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS, and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Order Sustaining Demurrer.

This cause having come on to be heard, on the 4th day of May, 1916, upon the demurrer of the defendants above named to the complaint heretofore filed herein, and the Court having listened to the arguments of counsel for the respective parties, and being fully advised in the premises:

IT IS, THEREFORE, CONSIDERED and ORDERED that said demurrer be and the same is hereby sustained; to which counsel for plaintiff herein duly excepts.

Dated Seattle, Washington, July 17, 1916.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 17, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [59]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation Organized Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS, and JANE DOE PARSONS, His Wife, FALCON JOSLIN and JANE DOE JOSLIN, His Wife, JOHN SCHRAM and JANE DOE SCHRAM, His Wife, E. L. WEBSTER and JANE DOE WEBSTER, His Wife, J. W. CLISE and JANE DOE CLISE, His Wife, F. E. BARBOUR and JANE DOE BARBOUR, His Wife, and WASHINGTON SECURITIES COMPANY, a Corporation,

Defendants.

Judgment.

In this cause the Court having on the 17th day of July, 1916, upon due hearing thereof, duly entered

its order sustaining the demurrer of the defendants above named to the complaint heretofore filed herein, and said plaintiff now appearing in open court, by his attorneys, de Journal & de Journal, Roy V. Nye and Hughes, McMicken, Dovell & Ramsey, and refusing to plead further herein;

Now, upon motion of said defendants, it is by the Court hereby ORDERED, ADJUDGED and DECREED that the complaint of said plaintiff herein be and the same is hereby dismissed, and that said defendants have and recover of and from said plaintiff the costs of said defendants herein; taxed in the sum of thirteen and 70/100 dollars. [60]

To all of which plaintiff, by his attorneys, duly excepts.

Done in open court this 17 day of July, 1916.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 17, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [61]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Assignment of Errors.

The above-named plaintiff, in connection with and
as a part of his petition for a writ of error filed
herein, makes the following assignment of errors,
which he avers were committed by the Court in the
rendition of the judgment against this plaintiff,
appearing upon the record herein:

I.

The Court erred in holding and deciding that the
complaint of the plaintiff did not state facts suffi-

cient to constitute a cause of action against the above-named defendants. [62]

II.

The Court erred in holding that the above-entitled action was not commenced within the time limited by law.

III.

The Court erred in sustaining the demurrer of the defendants to the complaint of the plaintiff.

IV.

The Court erred in not overruling the demurrer of the defendants to the complaint of the plaintiff.

V.

The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of defendants.

WHEREFORE, plaintiff prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that such directions be given that full relief may inure to plaintiff by virtue of his writ of error.

de JOURNAL & de JOURNAL,

ROY V. NYE,

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff. [63]

Copy of within Assignment of Errors received, and due service of same acknowledged this 31st day of July, 1916.

CLISE & POE,

PETERS & POWELL,

Attys. for Defendants. 1

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [64]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation Organized Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS, His Wife, FALCON JOSLIN and JANE DOE JOSLIN, His Wife, JOHN SCHRAM and JANE DOE SCHRAM, His Wife, E. L. WEBSTER and JANE DOE WEBSTER, His Wife, J. W. CLISE and JANE DOE CLISE, His Wife, F. E. BARBOUR and JANE DOE BARBOUR, His Wife, and WASHINGTON SECURITIES COMPANY, a Corporation,

Defendants.

Petition for Writ of Error.

Now comes the above-named plaintiff and says that on or about the 17th day of July, 1916, this Court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain

errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of [65] Appeals; and further prays that an order be made fixing the amount of security which the said petitioner shall give upon said writ of error.

Dated July 31st, 1916.

de JOURNAL & de JOURNAL,
ROY V. NYE,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff.

Copy of within petition for order allowing writ of error received and due service of same acknowledged this 31st day of July, 1916.

PETERS & POWELL,
CLISE & POE,
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [66]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS, His
Wife, FALCON JOSLIN and JANE DOE
JOSLIN, His Wife, JOHN SCHRAM and
JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Order Allowing Writ of Error.

This 31st day of July, 1916, came the plaintiff by
his attorneys, and filed herein and presented to the
Court his petition praying for the allowance of a writ
of error, an assignment of errors intended to be
urged by him, praying, also, that a transcript of the
record and proceedings and papers upon which the
judgment herein was rendered, duly authenticated,
may be sent to the United States Circuit Court of
Appeals for the Ninth Judicial Circuit, and that such
other and further proceedings may be had as may

be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff giving bond according to law, in the sum of Two Hundred (\$200.00) Dollars.

JEREMIAH NETERER,
Judge. [67]

Copy of this order granting writ of error and fixing amount of bond received and due service of same acknowledged this 31st day of July, 1916.

CLISE & POE,
PETERS & POWELL,
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [68]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS, His
Wife, FALCON JOSLIN and JANE DOE
JOSLIN, His Wife, JOHN SCHRAM and
JANE DOE SCHRAM, His Wife, E. L.

WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, F. G. Noyes, as receiver of the Washington-
Alaska Bank, a corporation organized under the laws
of the State of Washington, the above-named plain-
tiff, as principal, and United States Fidelity and
Guaranty Company, a body corporate, duly incor-
porated under the laws of the State of Maryland and
authorized to transact the business of surety in the
State of Washington, as surety, executing this bond
in behalf of said principal, are, jointly and severally,
held and firmly bound unto W. H. Parsons and Jane
Doe Parsons, his wife, Falcon Joslin and Jane Doe
Joslin, his wife, John Schram and Jane Doe Schram,
his wife, E. L. Webster and Jane Doe Webster, his
wife, J. W. Clise and Jane Doe Clise, his wife, F. E.
Barbour [69] and Jane Doe Barbour, his wife,
and Washington Securities Company, a corporation,
the defendants above-named, their heirs, executors,
administrators, successors and assigns, in the just
and full sum of Two Hundred (\$200) Dollars, for
the payment of which, well and truly to be made, we
bind ourselves and each of us, our and each of our
heirs, executors, administrators, successors and as-
signs, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of July, A. D. 1916.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT WHEREAS, in the above-entitled action a judgment was entered on the 17th day of July, A. D. 1916, dismissing the said action and awarding costs, and

WHEREAS, the said plaintiff has obtained from said Court a writ of error to reverse the said judgment in said action, and a citation directed to the defendants, and each of them, is about to be issued, citing and admonishing them, and each of them, to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California;

NOW, THEREFORE, if the said plaintiff shall prosecute the said writ of error to effect and shall answer all costs that may be awarded against him if he shall fail to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

[Seal]

F. G. NOYES,

As Receiver of Washington-Alaska Bank.

By HUGHES, McMICKEN, DOVELL &
RAMSEY,

His Attorneys.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By GROVER C. WINN,

Its Attorney in Fact. [70]

Sufficiency of the surety on the foregoing bond approved by me this 31st day of July, A. D. 1916.

JEREMIAH NETERER,

Judge of said Court.

Copy of within cost bond received and due service of same acknowledged this 31st day of July, 1916.

CLISE & POE,

PETERS & POWELL,

Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. July 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [71]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS et al.,

Defendants.

Stipulation as to Record.

IT IS HEREBY STIPULATED between the parties hereto that the Clerk of this Court in making up his return to the writ of error herein shall include therein the following:

Complaint;

Demurrer to Complaint;

Opinion of Court;

Order Sustaining Demurrer;

Judgment of Dismissal;

Assignment of Errors;

Petition for Order Allowing Writ of Error;

Order Granting Writ of Error and Fixing
Amount of Bond;

Cost Bond;

Writ of Error; and Copy of Writ of Error
Lodged with Clerk for Defendant in Error;

Original Citation and Acceptance of Service
Thereof;

Copy of Citation Lodged With Clerk for De-
fendant in Error;

Stipulation as to Record;

which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon such writ of error in the United States Circuit Court of Appeals, and that no other papers or proceedings than those above mentioned need be included by the Clerk of said Court in making up his return to [72] said writ of error as a part of such record.

Dated August 1st, 1916.

de JOURNEL & de JOURNEL,
ROY V. NYE,
HUGHES, McMICKEN, DOVELL &
RAMSEY,

Attorneys for Plaintiff.
CLISE & POE,
PETERS & POWELL,
Attorneys for Defendants.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

HUGHES, McMICKEN, DOVELL &
RAMSEY,

Attorneys for Plaintiff in Error.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 1, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [73]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants in Error.

Copy of Writ of Error (Lodged).

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to the Honorable
Judges of the District Court of the United
States for the Western District of Washington,
Northern Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which is
in the said District Court before you, or some of you,
between F. G. Noyes, as Receiver of the Washington-
Alaska Bank, a corporation organized under the
laws of the State of Washington, [74] Plaintiff,
and W. H. Parsons and Jane Doe Parsons, his wife,
Falcon Joslin and Jane Doe Joslin, his wife, John
Schram and Jane Doe Schram, his wife, E. L. Web-
ster and Jane Doe Webster, his wife, J. W. Clise and
Jane Doe Clise, his wife, F. E. Barbour and Jane
Doe Barbour, his wife, and Washington Securities
Company, a corporation, Defendants, a manifest
error hath happened, to the great damage of the said
F. G. Noyes, as receiver of the Washington-Alaska
Bank, a corporation, as by his complaint appears,
we being willing that error, if any hath been, should
be duly corrected and full and speedy justice done
to the party aforesaid in this behalf, do command
you, if judgment be therein given, that then under
your seal, distinctly and openly, you send the record
and proceedings aforesaid, with all things concern-
ing the same, to the United States Circuit Court of

Appeals for the Ninth Circuit, at the courtrooms of said Court in the City of San Francisco, in the State of California, together with this writ, so that you have the same at the said place, in said circuit, on the 28th day of August, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 31st day of July, A. D. 1916, and in the 141st year of the independence of the United States of America.

FRANK L. CROSBY,

Clerk of said District Court of the United States
for the Western District of Washington. [75]

The foregoing writ is hereby allowed.

JEREMIAH NETERER,

United States District Judge for the Western District of Washington. [76]

Received copy of the foregoing writ of error, lodged with me for defendants in error, this 31st day of July, 1916.

FRANK L. CROSBY,

Clerk of the United States District Court for the
Western District of Washington.

Copy of within writ of error received and due service of same acknowledged this 31st day of July, 1916.

CLISE & POE,
PETERS & POWELL,
Attorneys for Defendants in Error.

[Endorsed]: No. 3223. Lodged copy. Filed in the U. S. District Court, Western District of Washington, Northern Division. Jul. 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [77]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,
Defendants in Error.

Copy of Citation (Lodged).

United States of America,
Ninth Judicial Circuit,—ss.

To W. H. Parsons and Jane Doe Joslin, His Wife,
Falcon Joslin and Jane Doe Joslin, His Wife,
John Schram and Jane Doe Schram, His Wife,
E. L. Webster and Jane Doe Webster, His Wife,
J. W. Clise and Jane Doe Clise, His Wife, F. E.
Barbour and Jane Doe Barbour, His Wife, and
Washington Securities Company, a Corporation,
Defendants:

You and each of you are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 28th day of August, 1916, pursuant to a writ of error filed in the Clerk's office of the District [78] Court of the United States for the Western District of Washington, Northern Division, wherein said F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 31st day of July, 1916.

JEREMIAH NETERER,
United States District Judge for the Western Dis-
trict of Washington.

FRANK L. CROSBY,
Clerk of said United States District Court for the
Western District of Washington.

Copy of within citation received and due service
of same acknowledged this 31st day of July, 1916.

CLISE & POE,
PETERS & POWELL,
Attorneys for Defendants in Error. [79]

[Endorsed]: No. 3223. Lodged Copy. Filed in
the U. S. District Court, Western Dist. of Washing-
ton, Northern Division. July 31, 1916. Frank L.
Crosby, Clerk. By Ed. M. Lakin, Deputy. [80]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff,

vs.

W. H. PARSONS and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.

WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,

Defendants.

**Certificate of Clerk U. S. District Court to Tran-
script of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing typewritten pages, numbered from 1 to 82, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein, in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [81]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf

of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.) for making typewritten record, certifi- cate or return, 225 folios at 15c. . . .	33.75
Certificate of Clerk to transcript of rec- ord, 4 folios at 15c.60
Seal to said Certificate.20
	<hr/>
	\$34.55

I hereby certify that the above cost for preparing and certifying said record, amounting to \$34.55, has been paid me by Messrs. Hughes, McMicken, Dovell & Ramsey, Attorneys for Plaintiff in Error.

I further certify that I hereby attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 3d day of August, 1916.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [82]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS,
His Wife, FALCON JOSLIN and JANE
DOE JOSLIN, His Wife, JOHN SCHRAM
and JANE DOE SCHRAM, His Wife, E. L.
WEBSTER and JANE DOE WEBSTER,
His Wife, J. W. CLISE and JANE DOE
CLISE, His Wife, F. E. BARBOUR and
JANE DOE BARBOUR, His Wife, and
WASHINGTON SECURITIES COM-
PANY, a Corporation,
Defendants in Error.

Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to the Honorable
Judges of the District Court of the United States
for the Western District of Washington, North-
ern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
the said District Court before you, or some of you,

between F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, [83] plaintiff, and W. H. Parsons and Jane Doe Parsons, his wife, Falcon Joslin and Jane Doe Joslin, his wife, John Schram and Jane Doe Schram, his wife, E. L. Webster and Jane Doe Webster, his wife, J. W. Clise and Jane Doe Clise, his wife, F. E. Barbour, and Jane Doe Barbour, his wife, and Washington Securities Company, a corporation, defendants, a manifest error hath happened, to the great damage of the said F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said Court in the City of San Francisco, in the State of California, together with this writ, so that you have the same at the said place, in said circuit, on the 28th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUG-

LASS WHITE, Chief Justice of the United States, this 31st day of July, A. D. 1916, and in the 141st year of the independence of the United States of America.

FRANK L. CROSBY,

Clerk of said District Court of the United States for the Western District of Washington. [84]

The foregoing writ is hereby allowed.

JEREMIAH NETERER,

United States District Judge for the Western District of Washington. [85]

Received copy of the foregoing writ of error, lodged with me for defendants in error, this 31st day of July, 1916.

FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington.

Copy of within writ of error received and due service of same acknowledged this 31 day of July, 1916.

CLISE & POE,

PETERS & POWELL,

Attorneys for Defendants in Error. [86]

[Endorsed]: Original. No. 2838. In the United States Circuit Court of Appeals for the Ninth Circuit. F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation Organized Under the Laws of the State of Washington, Plaintiff in Error, vs. W. H. Parsons et ux., et al., Defendants in Error. Writ of Error. Filed Aug. 7, 1916. F. D. Monckton, Clerk. [87]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3223.

F. G. NOYES, as Receiver of the WASHINGTON-
ALASKA BANK, a Corporation Organized
Under the Laws of the State of Washington,
Plaintiff in Error,

vs.

W. H. PARSONS and JANE DOE PARSONS, His
Wife, FALCON JOSLIN and JANE DOE
JOSLIN, His Wife, JOHN SCHRAM and
JANE DOE SCHRAM, His Wife, E. L. WEB-
STER and JANE DOE WEBSTER, His
Wife, J. W. CLISE and JANE DOE CLISE,
His Wife, F. E. BARBOUR and JANE DOE
BARBOUR, His Wife, and WASHINGTON
SECURITIES COMPANY, a Corporation,
Defendants in Error.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To W. H. Parsons and Jane Doe Parsons, His Wife,
Falcon Joslin and Jane Doe Joslin, His Wife,
John Schram and Jane Doe Schram, His Wife,
E. L. Webster and Jane Doe Webster, His Wife,
J. W. Clise and Jane Doe Clise, His Wife, F.
E. Barbour and Jane Doe Barbour, His Wife,
and Washington Securities Company, a Corpo-
ration, Defendants;

You and each of you are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 28th day of August, 1916, pursuant to a writ of error filed in the Clerk's office of the District [88] Court of the United States for the Western District of Washington, Northern Division, wherein said F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 31 day of July, 1916.

JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

FRANK L. CROSBY,
Clerk of Said United States District Court for the Western District of Washington.

Copy of within citation received and due service of same acknowledged this 31st day of July, 1916.

CLISE & POE,

PETERS & POWELL,

Attorneys for Defendants in Error. [89]

[Endorsed]: Original. No. 2838. In the United States Circuit Court of Appeals for the Ninth Cir-

cuit. F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation Organized Under the Laws of the State of Washington, Plaintiff in Error, vs. W. H. Parsons et ux., et al., Defendants in Error. Citation. Filed Aug. 7, 1916. F. D. Monckton, Clerk. [90]

[Endorsed]: No. 2838. United States Circuit Court of Appeals for the Ninth Circuit. F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation Organized Under the Laws of State of Washington, Plaintiff in Error, vs. W. H. Parsons and Jane Doe Parsons, His Wife, Falcon Joslin and Jane Doe Joslin, His Wife, John Schram and Jane Doe Schram, His Wife, E. L. Webster and Jane Doe Webster, His Wife, J. W. Clise and Jane Doe Clise, His Wife, F. E. Barbour and Jane Doe Barbour, His Wife, and Washington Securities Company, a Corporation, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 7, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

~~ORIGINAL~~
No. 2838

**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a
corporation organized under the laws of the State of
Washington,

Plaintiff in Error,

v.

W. H. PARSONS and **JANE DOE PARSONS**, his wife,
FALCON JOSLIN and **JANE DOE JOSLIN**, his wife,
JOHN SCHRAM and **JANE DOE SCHRAM**, his wife,
E. L. WEBSTER and **JANE DOE WEBSTER**, his wife,
J. W. CLISE and **JANE DOE CLISE**, his wife,
F. E. BARBOUR and **JANE DOE BARBOUR**, his wife,
and **WASHINGTON SECURITIES COMPANY**, a corporation,
Defendants in Error.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.

BRIEF OF PLAINTIFF IN ERROR

HUGHES, McMICKEN, DOVELL & RAMSEY, D. Monckton
DE JOURNAL & DE JOURNAL,
OTTO B. RUPP,
ROY V. NYE,

Attorneys for Plaintiff in Error.

Seattle, King Co., Wash.

Filed

NOV 8 - 1916

Clerk

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No. 2838

**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a
corporation organized under the laws of the State of
Washington,

Plaintiff in Error,

v.

W. H. PARSONS and **JANE DOE PARSONS**, his wife,
FALCON JOSLIN and **JANE DOE JOSLIN**, his wife,
JOHN SCHRAM and **JANE DOE SCHRAM**, his wife,
E. L. WEBSTER AND **JANE DOE WEBSTER**, his wife,
J. W. CLISE and **JANE DOE CLISE**, his wife,
F. E. BARBOUR and **JANE DOE BARBOUR**, his wife,
and **WASHINGTON SECURITIES COMPANY**, a corporation,
Defendants in Error.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action at law, on a tort, for compensatory and exemplary damages given by section 7 of the Sherman Anti-Trust Act. The complaint al-

leges that the defendants and others violated section 3 of that Act by contracting, combining and conspiring to limit, restrict and suppress competition in the banking business in a territory, to-wit, at Fairbanks, Alaska, and the surrounding region; that the plan of the defendants and their fellow-conspirators was executed and thereby one of the banks at Fairbanks was ruined and destroyed. The receiver of that bank sues for the damage thus inflicted.

We will briefly summarize the allegations of the complaint. Three banking concerns did a banking business at Fairbanks; one, a partnership which was succeeded by a corporation organized under the laws of Nevada; this corporation the complaint calls the Nevada Company; another, a national bank called the First National Bank of Fairbanks; and a third, a corporation organized under the laws of the State of Washington, called in the complaint the Washington Company (it is the receiver of the Washington Company who is plaintiff in this action). The defendants (excepting the women) were the stockholders, and some of them were the directors, of the Washington Company; the women named are wives of stockholders of the latter company. Various contracts are set forth in the first fourteen paragraphs of the complaint by way of inducement, in order to show the system or plan adopted and pursued by the said banks in earlier years to suppress competition among them, and to exhibit the motives and purposes actuating the defendants and their fellow-conspirators in the transaction which forms

the gist of this action, namely, the transaction of 1909 which destroyed the Washington Company, and which is set out in paragraph XV and succeeding paragraphs of the complaint. To this latter transaction the Washington Company was not a party; on the contrary, as the allegations of the complaint disclose, the Washington Company, as a corporation, was the deliberately chosen victim thereof, notwithstanding that its stockholders—as individuals, not as stockholders—profited enormously thereby. That transaction is described as a design, fully carried out, on the part of the defendants and the directorate of the Nevada Company, to eliminate the Washington Company from the banking business with the purpose of limiting, restricting and suppressing competition and of concentrating said business in the hands of the Nevada Company. The said design was carried out by three devices: (1) The stockholders of the Washington Company, in consideration of \$140,000.00 “bonus” for their stock (really their share, paid in advance, of the anticipated and expected profits of the transaction), transferred all the capital stock of the Washington Company, and all its assets, to the Nevada Company by means of a so-called sale of said stock,—a null and void sale and purchase because wholly *ultra vires* of the Nevada Company; (2) the operating heads of the Washington Company agreed with the Nevada Company not to start another competing bank; (3) a consolidation of the Washington Company and the Nevada Company was falsely

pretended by the directorates thereof to be effected. To carry out this pretense they occupied the same office, their effects and assets were commingled, and the Nevada Company changed its name by taking the name of the Washington Company, "Washington-Alaska Bank," and announcement was made by the officers and persons in control of both said banks that they were consolidated. It is further alleged that, as the defendants well knew, the Nevada Company was insolvent; and that as the direct result of said transfer of stock and pretended consolidation the Nevada Company and its directors were placed in absolute control of the assets of the Washington Company and thereby were enabled to and did convert nearly the whole thereof to their own use. And it is charged that by said pretended consolidation the defendants intended, among other things, to deceive the public and the creditors of the Washington Company as to the true status of that company and its affairs, and that thereby the public and said creditors were deceived as to such status and affairs so that in 1911, when the pretended consolidated concern failed and closed its doors and a receiver was appointed by the Alaska Court and the assets were administered upon, said public and creditors and the Alaska Court and the receiver supposed and believed that the receiver was the official representative of and administrator upon the supposed consolidated corporation; but that by virtue of the *fact* (being matter of foreign law) that the laws of Nevada prohibited the Nevada Company

from consolidating with any foreign corporation, no consolidation really occurred and the receiver was the representative of the Nevada Company only; and that owing to the said deception practiced successfully by the defendants, it was not known until 1915 that there had been no consolidation, and that in the latter year, when this knowledge was first obtained, a receiver was appointed for the Washington Company in Alaska, and shortly thereafter the same person was appointed receiver for said Washington Company in Washington, where all the defendants live, and such receiver in Washington brings this action.

To this complaint the defendants demurred on several grounds, but relied upon two only, namely, that the complaint does not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law. The District Court sustained the demurrer on both grounds and entered judgment dismissing the complaint. To reverse this action of the lower court the plaintiff sued out the present writ of error.

SPECIFICATION OF ERRORS RELIED UPON

The plaintiff in error asserts and urges that the District Court erred in the following particulars:

1. The Court erred in holding and deciding that the complaint of the plaintiff did not state facts sufficient to constitute a cause of action against the above-named defendants.

2. The Court erred in holding that the above-entitled action was not commenced within the time limited by law.

3. The Court erred in sustaining the demurrer of the defendants to the complaint of the plaintiff.

4. The Court erred in not overruling the demurrer of the defendants to the complaint of the plaintiff.

5. The Court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of defendants.

ARGUMENT

The plaintiff contends that the contracts and conspiracy of September, 1909, by which the Washington Company was turned over to the Nevada Company and thereafter was despoiled by the latter, were the contracts and conspiracy of the defendants and the Nevada Company's directorate, not of the Washington Company itself. The position of counsel for the defendants, as we understand it, is that the "whole body of the stockholders," i. e., each and every stockholder considered collectively, is identical with the corporation, and that if all the stockholders were party to that conspiracy, *ipso facto* so was the corporation. They make no distinction between the action of each and every stockholder in dealing with his property *in his own private interest*, and the action of each and every stockholder *as a stockholder*, i. e., in dealing in the interest of the cor-

poration. They make no distinction, that is to say, between private action by stockholders and corporate action. We insist upon that distinction.

The plaintiff contends, as regards the branch of the demurrer based on the statute of limitations, that the defendants having admitted (for all present purposes) that the "sale" of their stock was null and void because *ultra vires* of the Nevada Company, and that therefore they are still the stockholders of the Washington Company and that the directors in office at the time of said sale have been at all times since and are still the directors of the Washington Company, and having further admitted that by the pretended consolidation they intended to deceive and did deceive all creditors and all others who might have caused steps to be taken in behalf of the Washington Company against the defendants, and having further admitted that there was neither a sale nor a consolidation, and that the receiver for the Nevada Company was not the receiver for the Washington Company, they have thereby, in legal effect, admitted that the statute of limitations did not run against the Washington Company's right of action against themselves until that company should by some means or other be placed in such hands that it could sue them, i. e., until it should be given a voice with which to speak and an arm with which to strike; and we maintain, therefore, that the statute of limitations did not begin to run until the receiver was appointed *for the Washington Company*, to-wit, in 1915, and that the action was commenced in ample

time. Whereas, the defendants assert, as we understand their position, that the time began to run when the supposed consolidated concern closed its doors in 1911 and expired three years thereafter.

The District Court, in its opinion sustaining the demurrer, adopts the positions of the defendants on both branches of their demurrer (tr. pp. 61-64, 69-71). The confusion of thought involved in the District Court's rulings herein will, we respectfully submit, become apparent as we proceed.

I.

The Complaint States a Cause of Action

On this branch of the demurrer to the complaint the District Court, we respectfully submit, went astray by failing to note, what we think is sufficiently clear on the face of the complaint, that the first fourteen paragraphs of the complaint contain nothing but formal allegations and matters of inducement, inserted for the purpose of exhibiting the origin and development of the banking business at Fairbanks and the status thereof existing, and the purposes actuating the defendants, when the conspiracy and combination of 1909, set forth in paragraph fifteen and subsequent paragraphs of the complaint, was entered upon by the defendants and the Nevada Company and the latter's directors. In said first fourteen paragraphs (tr. pp. 3-24) are set forth various contracts to which the Washington Company was a party, and those contracts show clearly

that the owners of the said two banks, and of the First National Bank of Fairbanks, during a period of time commencing practically with the opening for business by said three banks, were intent upon reducing competition among said banks, and upon holding at as high a level as possible the rates and charges for services rendered by the banks to their customers and the public, and upon holding at as low a level as possible the price paid by the banks for gold-dust—the purchase of gold-dust or the handling of it upon a percentage basis being at all times a main item and feature of the business of each of said banks. *All of these contracts were in plain violation of section 3 of the Sherman Anti-Trust Act.* These contracts, described and copied in the first fourteen paragraphs of the complaint, were made in the names of the three banks, or in the names of some of them and in those of the directors or stockholders of the others. So far as the contracts were made by the banks the latter were no doubt parties to the violation of the Sherman law as between the banks and their customers, whatever may be the case when the question of responsibility for such violation of law is narrowed down so as to lie between a given bank and its own directors and officers by whose action it became a party to the contracts. *As to its own customers, and, indeed, as to the customers of the other banks also,* the Washington Company became a law violator, became liable under said section 7, by its becoming a party to the contracts mentioned in the said matter of inducement in the complaint. We do

not blink that fact. But we maintain that said prior participation by the Washington Company in prior illegal contracts is wholly unrelated to the plaintiff's right to recover herein, for the following reasons: (1) Those prior contracts were separate and distinct from the one in suit, as is shown by the fact that the parties thereto were not the same, for from the contract in suit the Washington Company was expressly excluded for the very purpose of making it the butt and victim of the conspiracy, and by the further fact that the purposes and intended means of accomplishing these purposes were not the same or even similar; (2) no damage to the Washington Company is alleged or shown to have resulted from said prior contracts except the comparatively small and separable sum of \$5,000 claimed for the loss of the use of money paid for stock of the said First National Bank (tr. pp. 14, 47)—an allegation inadvertently made and which can and should be rejected as surplusage—but, on the contrary, all damage charged, except that inadvertently alleged as just stated, flowed from the conspiracy alleged in paragraph fifteen and succeeding paragraphs; (3) this is a suit by a corporation's receiver against its directors and stockholders, not a suit between the bank and its customers or the bank and the other banks, and consequently even if the Washington Company had been a party to the last mentioned conspiracy (which it clearly was not) instead of the deliberately selected victim of it, the corporation could recover against the natural persons who were

responsible for its participation therein to its loss, whether its directors or stockholders or both.

A.

The Contracts and Conspiracy of September, 1909, Were Separate and Distinct from Those Preceding Them

It is true that in paragraph XI of the complaint (tr. p. 12) it is alleged that the first agreement, combination and conspiracy entered into was continued up to and including January 4, 1911, but that allegation, when read in the light of the others in the complaint setting forth specifically *in ipsius verbis* the subsequent contracts, means no more than that the purpose to control the banking business at Fairbanks and to eliminate competition therefrom, persisted in the minds of the parties to said original contract, *or some of them*, down to 1911, as evidenced by said other contracts. Though technically the directors or officers of the banks were not parties to most of the written contracts set forth in the complaint, the contracts being in form contracts of the corporations, yet in the nature of things the directors were parties to the conspiracies and combinations evidenced by said contracts. Therefore it is correct to say that the parties to each unlawful combination and conspiracy were the banks signatory and the directors of such banks. But though in the nature of things the directors of any signatory bank must have been parties to the breach of law involved

in entering into such contract, combination and conspiracy, the converse is *not* true: it is not true that because the persons who were directors of a given bank were parties to an unlawful conspiracy and combination, therefore the bank was a party too. Thus, considering paragraph XIII of the complaint (tr. p. 14), it is charged that the Washington Company and the Nevada Company and their directors suspected that the First National Bank was violating the original agreement of 1905, and, therefore, to carry out the purpose of that agreement, determined to buy and did buy the stock of the First National Bank. It is clear that the First National Bank was not and could not be a party to *that* agreement to sell its stock, though its stockholders, not as stockholders, but as individuals, were such parties; and it is also clear therefore that the First National Bank was not a party to the plan of the Washington Company and the Nevada Company and their directors involved in that particular conspiracy. For the sale of that stock by those stockholders, as individuals, was individual, not corporate, action. The stockholders of the First National Bank, as individuals, may or may not have been parties to such plan and have intended to further it by such sale, but the First National Bank clearly was not a party thereto. Whether by virtue of said sale and the consequent surrender of the First National Bank to the Washington Company and Nevada Company, the First National Bank ceased to be a party to the original combination and

conspiracy—and to any combination and conspiracy—is a question which will, in effect, be answered hereinafter. Whether by said sale the selling stockholders of the First National Bank were parties to said plan to further concentrate and control the banking business at Fairbanks, which was the actuating motive of the purchasers of the stock, is a question of fact, depending for its answer upon the *quo animo* or intention of the sellers or upon the natural result of that sale; if their purpose was to further that end, or if they knew that the direct and natural result of the sale was to further that end, then they were such parties (*Standard Oil Case*, 221 U. S. 1, and *Tobacco Case*, 221 U. S. 106).

Another contract to which the First National Bank was not a party, either nominally or actually, is that set forth in paragraph XIV of the complaint (tr. pp. 22-24); its purpose was, apparently, to equalize the profits of gold-dust handling as between the Washington Company and the Nevada Company.

Still other agreements to which the First National Bank was in no sense a party are those set forth in paragraph XV of the complaint and subsequent paragraphs (tr. p. 24, ff.). And neither was the Washington Company in any sense a party to the last mentioned agreements.

So that it is clear that the above-mentioned allegation in paragraph XI of the complaint, that the original agreement, combination and conspiracy of 1905 was continued down to 1911, means, when read

in connection with the other allegations of contracts entered into later, only that the abstract purpose which was the motive for entering into said original agreement continued and persisted down to 1911; that it was concretely present during *all* of that time, *not in all of the parties* to the original combination and conspiracy, but, as the process of elimination above used demonstrated, *in only a part of said parties*. For first we find the First National Bank, as a corporation, excluded, and later the Washington Company, as a corporation, is excluded. To the conspiracy evidenced by the agreements set forth in the fifteenth and succeeding paragraphs it is clear that neither the first National Bank nor its *real* stockholders nor its *real* directors were parties. We say "real" because the so-called sale, above mentioned, of the stock of the First National Bank to the other two banks was *ultra vires* of the purchasing banks, and therefore null and void, and of course the result is that the "sellers" of the stock continued to be stockholders, and the directors theretofore chosen from among their number continued to be the First National Bank's directors, after the "sale" no less than they were before (see tr. p. 41). Now said true stockholders and directors of the First National Bank are not alleged to have even known of the contracts alleged in the fifteenth and later paragraphs. While, therefore, the complaint does not affirmatively allege that the First National Bank dropped out of the original and every subsequent combination and conspiracy, it is patent from

the allegations made that it did so drop out. It does not follow that having once become a party to such a combination and conspiracy it could not cease to be a party if any members of the combination persisted in the original plan, or in a subsequent but similar plan. The very purpose of sections 4 and 5 of the Sherman Act is to dissolve combinations. The law itself contemplates an enforced dropping out of all the parties to a combination. The same result may be attained by the voluntary action of the parties. If all may discontinue, then some may discontinue, notwithstanding that others continue in the unlawful combination and conspiracy. This is not to say that any party, by so discontinuing, can escape its or his liability under section 7, or under sections 1, 2, or 3, for acts done prior to ceasing to be a party, or for damages accruing subsequent to so ceasing to be a party but being the proximate and natural and probable consequences of acts done theretofore. But by the very act of ceasing to be a party it or he would be freed from liability for all damages subsequently accruing and disconnected from and not proximate to or naturally flowing from the acts done prior to so ceasing to be a party.

For instance, the First National Bank was a party to the original agreement but certainly it could not be held responsible by the creditors of the Washington Company for the damages they sustain through the insolvency of the latter company caused by the things and acts alleged in the fifteenth and subsequent paragraphs. For, as the complaint shows,

the First National Bank was in no way a party to those matters, *unless* participation in the other and prior contracts made it so. The argument that it was and is so responsible because each member of a conspiracy is responsible for the acts of every other member done in and about furthering the conspiracy, does not refute this position because it begs the question,—it assumes that the original conspiracy still existed because a purpose of controlling the banking business which actuated said original conspiracy also actuated the making of the contracts set forth in the fifteenth and later paragraphs. But it was not the same conspiracy or combination, as we have already shown, because it was *by* different parties (namely, only a part of the members of the original conspiracy) and was *for the benefit* of different parties (namely, only a part of the original parties), and it was to be accomplished by different *means* (namely, by the total elimination of a bank wholly outside the membership of the last mentioned conspiracy, though a member of the original one, namely, the Washington Company). If different parties, wholly different distribution of benefits, and different means of accomplishing purposes, do not indicate and demonstrate different and distinct conspiracies, we are at a loss to know what would.

Indeed, it seems absurd to say that a combination directed to the mutual benefit of A and B and C is the same as a combination devoted to the benefit of A and B only, such benefit to be obtained by the de-

signed and calculated destruction of C. It seems absurd to say that a combination intended to benefit mutually the Nevada Company, the Washington Company and the First National Bank of Fairbanks, or the first two banks only, is identical with a combination intended to benefit the Nevada Company and the stockholders of the Washington Company, *not as stockholders but as individuals*, by means of the destruction of the Washington Company.

By means of numerous contracts three distinct conspiracies are set out in the complaint, two of them as a matter of inducement and the third as the ground of this action. The first one is the conspiracy *between the three banks* in 1905 (which we call herein the original conspiracy), set out in paragraph X (tr. pp. 8-12). The second one is the conspiracy between the Nevada Company and the Washington Company (and *possibly* the stockholders of the First National Bank), set out in paragraph XIII (tr. p. 14). The third one, and the ground of action in this case, is the conspiracy between the Nevada Company, and its directors, and the stockholders of the Washington Company, set out in paragraph XV and succeeding paragraphs (tr. p. 24). While all three were directed at controlling the banking business at Fairbanks and the surrounding country, the first was aimed at controlling it and keeping it in the hands of the owners of three banks; the second at keeping it in the hands of the owners of two banks; the third at keeping it in the hands of the owners of one bank.

The purposes and results of the last-mentioned conspiracy are a good test as to whether the Washington Company was really a party thereto (we say really, because it was certainly not nominally a party thereto). If the corporation, as such, participated in that conspiracy it certainly must have been because of expected advantage or profit to itself as a corporation, but so far from that being the case it had nothing to expect but absorption of its substance by the Nevada Company, and *that* was the result. It may be asserted that, though it would be an abuse of their power and position, a corporation may be made by its stockholders or directors to enter a conspiracy, if they can see that, though it will hurt the corporation, it will benefit the stockholders. But as we have already shown, the stockholders, *as such*, can be benefited only if the corporation is benefited, no matter what may be the case as to any individual benefit which they may reap. Certainly it was not as *stockholders* but as *disposers of property* at an enormous excess over its real value that the defendants profited. And it was not as a stockholder thereafter that the Nevada Company profited, but as a despoiler and pillager of the Washington Company. It simply took advantage of its position to rob the Washington Company. It is indisputable, we hold, that the fortunes of a stockholder, as such, go up or down as the fortunes of the corporation go up or down.

But, it may be argued, and was argued in the lower Court, that it is immaterial if the conspiracy

of 1909 was distinct from the other two, for the complaint charges that *all* the stockholders of the Washington Company entered into it, and all of the stockholders are identical with the corporation; therefore the corporation was a party to said third conspiracy.

B

A Corporation Is Not Identical with All Its Stockholders

It is indispensable to the supporting of the demurrer for insufficiency of the complaint that the whole body of the stockholders should be held to be identical with the corporation. Each and every one of the stockholders of the Washington Company was a party, the complaint charges, to the combination and conspiracy of September, 1909. It is manifest from the complaint that the Washington Company, *as a corporation*, was not such party. *It* did not assign the defendants' stock to the Nevada Company. *It* did not plan that the banking business should be centered in the Nevada Company by and through its own destruction and ruin. We should deem it a waste of this Court's time, and an inexcusable trespass against its patience, to dwell upon this point were it not for the fact that the lower Court fell into the error of assuming that the corporation and the whole body of its stockholders are identical, and that if *all* the stockholders do a certain act that act is therefore the act of the corporation. In ruling on the demurrer, the lower Court said (tr. p. 61):

“ * * * it is sought to draw a distinction between the whole body of the stockholders of the corporation and the corporation itself, so as to place the guilt, if any, upon the stockholders, and still leave the corporate entity guiltless.”

Again (tr. p. 65):

“All the stockholders of this corporation, it is alleged, joined the combination. The receiver, then, represents no person who is directly interested who is not a party to the unlawful combination, and as such party to an illegal combination, cannot sue under the Sherman Act for damages which he has suffered.”

Our answer to this is that the receiver does represent the corporation and that the corporation was *not* a party to, but was the carefully selected victim of, the combination and conspiracy of 1909, and that the receiver, in the corporation's right, *can* sue under the Sherman Act for the damages it sustained therefrom.

In order to preserve clarity of thought it is necessary to look squarely at the ambiguity which lurks in the expression “whole body of the stockholders,” used by the lower Court. Stockholders are natural or artificial persons who bear a certain relation, well defined by law, to a corporation; in this use of the word *the relation is a part of the definition* of it; for instance, “the stockholders elected A, B, and C directors of the corporation”; that is an activity strictly *as stockholders*—the relation is part of the very idea; that is the *proper* meaning of the term. But the term is also used to refer to those persons,

not in connection with this relation *as a part of the definition* of the term but only as a *description* of persons—a description used in connection with some relation entered upon or sustained by those persons to something other than the corporation; for instance, “the stockholders of company A have organized company B”; so used, it clearly means that certain persons, who are stockholders of company A, have, *not as stockholders of A but as individuals*, organized company B; it is no part of their business as stockholders of A to do anything except act in regard to the business of A—it is no part of their business as such stockholders to organize B. And it is immaterial that it is “the whole body of the stockholders” who act, i. e., each and every one of them; it is still personal, individual action, not action in the relation which gives the import to the term “stockholders” when properly and strictly used. When it is said that the whole body of the stockholders of the Washington Company sold their stock to the Nevada Company, nothing more *can* logically be meant than that each and every person *who answered to the description* of stockholder of the former company, acting in his personal and individual capacity, not acting as a stockholder, sold his stock to the latter company. It is no part of the business of a stockholder, and it is *not within his power* as a stockholder, to sell his stock. That is simply individual action dealing with his property, not action as a stockholder.

In discussing this case one must mark carefully

which meaning attaches to the word "stockholders" in a given statement or proposition. This dual meaning of the term was kept clearly in mind by the Supreme Court of Ohio in *Goodin v. Cincinnati etc. Co.*, 18 Oh. St. 169, 183, when it said:

"A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign. No matter if a majority of the stockholders, as well as himself, have personal interests in conflict with those of the company. He does not represent them as *persons*, or represent their *personal* interest. He represents them as *stockholders*, and their interests *as such*. He is trustee for the *company*, and whenever he acts against *its* interests—no matter how much he thereby benefits *foreign* interests of the individual stockholders, or how many of the individual stockholders act with him—he is guilty of a breach of trust, and a court of equity will set his acts aside, at the instance of stockholders or creditors who are damnified thereby. Any act of the directory by which they intentionally diminish the value of the stock or property of the company is a breach of trust, for which any of the stockholders or creditors may justly complain, although all the other stockholders and creditors are benefited. in some other way, more than they are injured as such." (The italics are the Court's.)

Now, the proposition, accepted and adopted by the lower Court, that a corporation is identical with the body of its stockholders, is at daggers drawn with fundamental conceptions regarding corporations and, with great deference to the District Court, is

not the law. Could each and all of the stockholders, uniting in a deed of the corporation's property, convey it away? Would their act be the act of the corporation? If a debt be owing to the corporation could each and all of the stockholders join in a suit to recover it?

In *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 277-279, 34 S. W. 209, 215, the Court said:

“The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. * * * A corporation and its shareholders are distinct legal entities. In *Keith v. Clark*, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, ‘the bank and the State are entirely different legal entities,’ and in *Lillard v. Porter*, 2 Head, 177, it was said, ‘stockholders are totally distinct from the corporation.’ Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

“ ‘Shareholders,’ says Thompson, ‘are not joint tenants, or in any other sense, co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so

much of the fund thus created as remains unimpaired, and is not liable for the debts of the corporation.' Thomp. Corp. §1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed."

In *Wheelock v. Moulton*, 15 Vt. 519, 522, Moulton and Hutchinson, owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repayment of money borrowed from Wheelock. The suit was to enforce the mortgage. Judge Redfield, speaking for the Court, said:

"The fact that the signers of this deed owned the whole of the shares, will make no difference, in regard to the necessity of a vote of the corporation, in order to convey the land. The *title* to the land was in the corporation, not in the individual stockholders. The deed of one, or any number of the stockholders will not affect the *title* of the land. The share owners are not tenants in common of the land. They have no title, whatever, to any of the property of the corporation. It is true that one, who owned all the shares, might control the corporation, and so he could if he owned a majority of the shares; *but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation.* This, in the present case, was not attempted. And the deed is what its terms import—that of Moulton and Hutchinson, *in their private capacity.*"

In *Button v. Hoffman*, 61 Wis. 20, the argument underlying the view of the lower Court in the case at bar was put baldly, and was answered by the Court, thus:

“The evidence of the plaintiff’s title was that the property belonged to a corporation known as ‘The Hayden & Smith Manufacturing Company,’ and that he purchased and became the sole owner of all the capital stock of said corporation. As the plaintiff in his testimony expressed it, ‘I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, *and I am the company.*’ * * * Is this sufficient evidence of the plaintiff’s title? We think not. The learned counsel of the respondent in his brief says: ‘The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, *and thus became its sole owner.*’ From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, *and do business*, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. * * * These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, *and does not himself become the corporation*, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else.”

In *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 219, 54 N. W. 1115, 1116, the plaintiff sued to

recover for goods sold and delivered by his assignor to the defendant corporation. B. and V., sole owners of the corporation's stock, intervened, setting up their exclusive ownership of the stock, and their ownership of two judgments, one in favor of B., the other in favor of V., against the plaintiff's assignor, recovered before the assignment to plaintiff, and which judgments, on account of the insolvency of said assignor, they prayed to be equitably set off against the plaintiff's claim. Judge Mitchell, speaking for the Court, discussed the intervenor's contention, and said:

“To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest.

* * * * *

“Illustrations might be multiplied indefinitely to show that to recognize any such right (of set-off) would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders.”

In the English case of *Foster & Son, Limited, v. Commissioners of Inland Revenue*, (1894) 1 Q. B. 516, the question was, whether the transfer of the property of a partnership by the eight members thereof to a limited company organized by them to take over and conduct the business was subject to an *ad valorem* duty “upon conveyance or transfer

on sale of any property," under the terms of the Stamp Act. The lower Court was divided in opinion, one judge being of opinion that the eight persons and the corporation were not identical, but the other judge being of opinion that they were identical. The case was therefore carried to the Court of Queen's Bench, where by a unanimous Court the corporation and the eight persons were held to be not identical. Lord Justice Lindley said:

"Although the persons of the first eight parts may be, and were, members of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. * * * Now, what is that instrument? It is certainly a conveyance of property—that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. * * * But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial."

And Lord Justice Kay said:

"In the first place, a corporation is a different thing from the individuals who compose it."

And Lord Justice Smith said:

“It seems to me that the company limited are not the same persons as the eight members of the old firm—they are different altogether.”

See, as representative of a vast number of authorities supporting the same doctrine:

Humphreys v. McKissock, 140 U. S. 304;
State v. Morgan's L. & T. R. & S. S. Co.,
 106 La. 513, 525, 31 So. 115, 121;
Baldwin v. Canfield, 26 Minn. 43;
Puritan Coal Mining Co. v. Penn. Ry. Co.,
 85 Atl. 426, 433;
 Morawetz on Priv. Corp., §§227-234;
 Green's Brice's *Ultra Vires* (2d. Am. Ed),
 §§1, 2.

C

Exceptions to the Rule that a Corporation is an Entity Distinct from Its Stockholders

In a few early cases the courts ascertained the citizenship of the corporation by the citizenship of its stockholders. This was done in determining whether the federal courts had jurisdiction on the ground of diversity of citizenship. *Bank of United States v. Deveaux*, 5 Cranch (U. S.) 61. But later this method of determining the citizenship of a corporation (i. e., by examining into the citizenship of the stockholders) was abandoned and repudiated by the very courts which had used it; and a corporation for a long time past and now, alike in federal and state courts, in law and equity cases, has been and

is universally held to be a citizen and inhabitant of the jurisdiction under the laws of which it was organized. *Louisville Railroad Co. v. Letson*, 2 How. (U. S.) 497, 554-559; *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. (U. S.) 314; *Muller v. Dows*, 94 U. S. 444; *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545.

So that this class of cases is no longer an exception to the rule, that a corporation is an entity separate and apart from its stockholders, and has not been such exception for a long time past.

On the ground of preventing fraud and wrong

ation, when such contracts are intended to inure to its benefit, and do in point of fact inure to its benefit, and the benefit is accepted by it, and the contracts are thereby adopted. 1 Redfield, Law of Railways (5th ed.), p. 18; *Edwards v. Grand Junction Ry. Co.*, 1 Mylne & C. 650; *Stanley v. Birkenhead Ry. Co.*, 9 Simons 264; *Little Rock & F. S. R. Co. v. Perry*, 37 Ark. 164; *Bommer v. American etc. Mfg. Co.*, 81 N. Y. 468. But if the benefit is not actually accepted by the corporation and the contract thereby

adopted, the contract is not enforceable against it. *Penn. Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22; *Caledonian & Dumbartonshire Ry. Co. v. Magistrates of Helensburgh*, 2 Macqueen's Appeals (House of Lords) 391; *Gent v. Insurance Co.*, 107 Ill. 652; *Morrison v. Gold Mt. G. M. Co.*, 52 Cal. 306; *Hawkins v. Mansfield G. M. Co.*, 52 Cal. 515; Morawetz on Priv. Corp., §§547-549. And (2) where individuals create a "paper" corporation to cover a fraud or wrong, or by means of a corporation already existing intentionally cover a fraud or wrong, or resort to the corporate form to free themselves from individual obligations which, prior to the organization of the company, attached to them with respect to the business they propose to carry on by means of the company. Such were the cases of *Linn & Lane Timber Co. v. United States*, in this Court, 196 Fed. 593; *McCaskill Co. v. United States*, 216 U. S. 504, 514-515; *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247; *In re Rieger*, 157 Fed. 609.

But these classes of cases have nothing in common with the case at bar. In the first class, the corporation, when it becomes organized, is held to adopt the contract. In the second class, the incorporation is considered merely colorable, and the corporation is held to be bound by the obligations of the corporators. Both classes are almost invariably in equity and exist, *absolutely invariably*, for the prevention of fraud and for the forwarding of right. The case at bar is at law, and the defendants

ask that the corporation be absolutely identified with them—and for what purpose? *To frustrate a right and to protect a fraud and wrong.*

After referring to the exceptional classes of cases just mentioned, Cook says in his work on Corporations, §§663, 664:

“The above illustrations, however, *are merely exceptions to the general rule* that a corporation is an entity that exists independently of its stockholders and that that entity will be respected and upheld by the courts.”

The general rule is recognized even in the very cases which belong to the said exceptional classes. Thus, in *McCaskill Co. v. United States, supra*, the Supreme Court of the United States said (216 U. S. 504, 514):

“Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest.”

And in *United States v. Milwaukee Refrigerator Transit Co., supra*, the Court said (142 Fed. 247, 255):

“If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity *as a general rule, and until sufficient reason to the contrary appears*; but, when the notion of legal entity is used *to defeat public convenience, justify wrong, protect fraud, or defend crime*, the law will regard the corporation as an association of persons.”

Morawetz says in his work on Private Corporations, §227:

“ * * * courts of law, as distinguished from courts of equity, do not, as a rule, look beyond the fiction of a separate corporate entity. * * * At law, a corporation and its shareholders are considered as entirely distinct from each other.”

And in §232 the same author says:

“It has been pointed out, that the fiction by which a corporation is treated as an entity distinct from its shareholders has its important uses. In many instances, the application of this fiction is absolutely essential; and it may be laid down as a general rule, that the convenient administration of justice is best served by treating a corporation as a collective entity, without regard to its individual shareholders, *in all cases except those in which the equitable rights and liabilities of the shareholders cannot be ascertained and enforced* without considering the real relation existing between the parties.

“Liabilities incurred by parties in a corporate capacity are materially different in their scope and effect from liabilities incurred in a personal capacity, whether severally or jointly, or as partners. It is a question of intention whether the parties have incurred a liability of the one class or the other, and the intention of the parties is indicated by the form in which they have contracted or acted. If persons use a corporate name or form in entering into a contract, this indicates that they intend to contract as a corporation, and not personally; and if they enter into a contract under a firm name, or individually, this is *prima facie* evidence that they intend to be bound personally. This distinction must be observed even where all the shares in a corporation are held by a single person; his transactions in the corporate name

would differ in substance and legal effect, as well as in form, from those entered into personally. In all cases it is indispensable that the fiction of a corporate entity apart from the individual shareholders be preserved unimpaired, in measuring and enforcing those rights and obligations which are of a corporate character."

The ground of the exception, then, is always and unfailingly the same; namely, prevention of fraud and wrong. Practically all of the cases are in equity. But even some law cases *recognize* the principle which creates the exception—i. e., that, if to apply the doctrine that a corporation is distinct from its stockholders would result in protection to fraud or wrong, the doctrine will not be applied, but the corporation and stockholders will be considered identical. We say "recognize" the principle, for in no case at law that we have found, has the exception actually called for application. For instance, the principle was recognized in a case on which the lower Court relied, in the case at bar, very greatly; namely, *State v. Standard Oil Co.*, 49 Oh. St. 137. But in that case the corporation, *as such*, was guilty of illegal and *ultra vires* acts, and therefore there was no occasion actually *to apply* the exception. But it is clear, from what the Court says in that case, that if the unearthing of the wrong and the striking down of the barrier protecting fraud had depended upon doing so, the Court would have applied the exception, even in that case at law. What we insist on is this, that whether it be an equity case or a law case, the ground for the exception and

its application is always the same—prevention of fraud and wrong. Most clearly, therefore, there is no possible ground in this case upon which the defendants can invoke the application of the exception, no possible reason for them to insist that they and the corporation are identical. For they do not invoke the exception in order to unearth fraud or prevent wrong, but to protect fraud and wrong, and the Court will not hear them for that purpose.

The cases of *State v. Standard Oil Co.*, 49 Oh. St., 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, just now referred to, and *People v. North River Sugar Refining Co.*, 121 N. Y. 587, 24 N. E. 834, 9 L. R. A. 33, are much relied upon by the lower Court in this case (tr. pp. 62-64). Both of those cases were in the nature of *quo warranto*, and therefore were at law. Because those two cases seem to be the authorities on which, almost if not quite exclusively, the lower Court seems to have sustained the demurrer herein on the ground of failure of the complaint to state a cause of action, they demand a detailed consideration. We will first consider the Ohio case and then the New York case.

State v. Standard Oil Co., 49 Oh. St. 137.

We have stated that this case was at law, but it is apparent that it was treated more as an equity suit than as a law action. The prayer of the amended petition closed with the words “and that such other

relief be granted in the premises as to the court may seem just and proper," and the relief actually granted by the Court was granted under this general prayer—no part of the relief specifically prayed for was granted. We mention this only incidentally, for it is not upon this narrow ground of the form of the action or the character of the relief given that we place our statement that the case forms no exception to the rule that courts recognize the non-identity of stockholders and corporation, except where to do so would protect fraud or wrongdoing.

The case shows on its face that the defendant company, *in its corporate capacity*, was an active participant in the *ultra vires* combination and trust set forth in the opinion. The contract creating the terms and conditions of the trust provided that in each of the four States of Ohio, Pennsylvania, New Jersey and New York, a corporation should be organized to be called the "Standard Oil Company of — — — —" (here followed the name of the State under which it was organized), "provided, however, that instead of organizing a new corporation, *any existing charter and organization may be used for the purpose when it can advantageously be done*"; and the contract further stipulated, in paragraph II, sub-paragraph (7), that "all the property, real and personal, assets, and business, of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred and vested in the said several Standard Oil Companies. All of the property, assets, and business

in or of each particular state shall be transferred to and vested in the Standard Oil Company of that particular state," and in sub-paragraph (9) is a similar provision regarding other corporations and partnerships conveying all their property and assets to the Standard Oil Company "of the proper state."

Now, no new Standard Oil Company was organized in Ohio under the terms of this contract, but the then existing company, the one organized in 1870, *the defendant in the case*, took over the property of said numerous other corporations and partnerships in Ohio, and acted as the holding company, or, more properly speaking, the absorbing company of those other concerns, during a period of eight years.

As the Court says in its opinion, 49 Oh. St. 179, 30 N. E. 288:

"The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, The Standard Oil Company of Ohio, being one. It is then covenanted by the parties, that as soon as practicable, a corporation shall be formed in each of certain states, under the laws thereof, Ohio being one, to mine for, produce, manufacture, refine and deal in petroleum and all its products; with the proviso, however, that instead of organizing a new corporation, any existing one 'may be used for the purpose when it can advantageously be done,' and in Ohio the defendant has been so used."

The Court further says, 49 Oh. St. 183, 30 N. E. 289:

“ * * * and the averment in the answer that the dividends of the company are paid to the holders of its stock, ‘appearing as such on its stock books,’ is immaterial; since these persons are not the owners, but the trustees of the stock. In fact the averment is simply a part of the evidence, *that the company, through its directors, recognizes and performs the agreement on its part.* The payment of its dividends to the persons appearing as stockholders on its stock-books, is what enables the parties to the agreement to realize the primary object of the trust agreement.”

The proceeding to forfeit the defendant's charter was begun in 1890, so that for eight years the defendant, the Standard Oil Company of Ohio, had been an active participant in the combination and trust. As such it must have received and accepted, as a corporation, grants of all the property of several other concerns and held such property as its own under the trust arrangement, and in all things carried out the terms of the trust agreement.

As we have already stated, the Court in that case expressly recognizes the grounds for not following, in some cases, the rule that a corporation and its stockholders are separate and distinct; it expressly says that, *to prevent fraud and wrong*, courts will refuse to view a corporation as distinct from its stockholders. This is the Court's language, 49 Oh. St. 179, 30 N. E. 287:

“Now, so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, *should not be called in question*; but where it is urged *to an end subversive of its policy*, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals, and in respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders, having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. *If it were otherwise, then, in one department of the law fraud would enjoy an immunity awarded to it in no other.*”

Again the Court says, 49 Oh. St. 177, 30 N. E. 287:

“All fictions of law have been introduced for the purpose of convenience and *to subserve the ends of justice*. It is in this sense that the maxim *in fictione juris subsistit aequitas* is used and the doctrine of fictions applied.”

Certainly the recognition of the fiction that a corporation is an entity separate and distinct from its stockholders “subserves the ends of justice” in the case at bar. That fiction should therefore be here recognized and applied.

People v. North River Sugar Refining Co.,
121 N. Y. 587.

This also was a trust case. Various companies engaged in refining sugar entered into a trust. With great respect and deference for the lower Court herein, we confess ourselves at a loss to understand how, in the light of the second quotation (tr. p. 63) made by the lower Court from *People v. North River Sugar Refining Co.*, the Court could have failed to note that the *corporation itself* in that case, in its corporate capacity, was guilty of *ultra vires* acts in entering a trust, properly subjecting it to forfeiture of its charter. We quote from the opinion, 121 N. Y. 615, 9 L. R. A. 1, 41:

“On the 22d day of April, 1887, there was a meeting of defendant’s stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote:

““Whereas, it is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

““Whereas, *we deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation; therefore be it*

““Resolved, That Peter Moller, Jr., George H. Moller and Gerd Martins be, and they are hereby, appointed a committee to make arrangements *to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act and to sign all contracts and agreements in the name of said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.*

“ ‘Resolved, that *we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements and papers which the above-named committee may make in relation to the said consolidation.*’

“*In September following the secretary of the corporation added his signature to the deed. He tells us under oath: ‘I made that signature by virtue of authority from the stockholders and the board of officers of the North River Sugar Refining Company, the stockholders and trustees.’ * * * Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant Company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency.*”

So it was very palpably a case of corporate action. Another consideration: The Court expressly recognizes and holds that if, instead of the stock of the company having been placed in the hands of trustees, it had been sold, out and out, as the defendants herein sold their stock (so far as they could—they undoubtedly believed they had sold it, though the “sale” was wholly void), then, in that event, the corporation would have been guiltless; guiltless, even though the stock had thereafter been used to control the corporation to unlawful ends. If it had been a sale of stock, says the Court, the corporation would not have been guilty. The fact that in the case at bar the “sale” was void can make no dif-

ference in the application of that principle herein. The Court said:

“But that proof (namely, proof that the corporation was in the trust arrangement) does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board (i. e., of the trustees of the pool) *by its own voluntary action*, or the will and power of others than itself; by force of a contract to which it was in reality a party, *or as the simple consequence of a change of owners*; by its fault or its misfortune; *by a sale or by a trust*. For if it has done nothing, if what has happened and all that has happened is ascertained to be that the stockholders of the defendant, one or many, *sold absolutely* to the eleven men who constituted the board *their entire stock*, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, *it is difficult to see wherein the corporation* has sinned, or what it has done beyond merely omitting for a time to carry on its business.”

The Court held that the transaction was a trust or pooling arrangement, not a sale.

Hence that case is clearly distinguished from the case at bar, and is no authority for the ruling of the lower Court herein, for two reasons: (1) the corporation, *as such*, by *ultra vires* conduct violated the law; (2) the Court there says that if the transaction had been a sale of stock to the trustees of the pool, not a mere trust arrangement, the corpo-

ration would not, as a corporate entity, have been guilty of *ultra vires* or illegal conduct—the transaction would have been its “misfortune,” not its “fault.” In the case at bar the “sale” had all the effects and results in fact, though not in law, of an absolute sale, and what befell the Washington Company thereby and thereafter was certainly its misfortune, not its fault.

Neither the Ohio Case nor the New York Case Supports the Ruling of the Lower Court Herein

The corporation was held to be a law violator in each of these cases. In neither case was it necessary to identify corporation and stockholders in order to reach such decision. For, assuming its separate entity, the corporation, in each case, was guilty. Therefore all that was said in the opinions about the corporation being accountable *because* it was identical with the stockholders, was both a dictum and a *non sequitur*. The argument of the Courts in these cases runs as follows:

Major premise: If the stockholders do acts intended to affect the corporation with *ultra vires* conduct to the wrong of and fraud upon the State, the corporation itself, because it must be identified with the stockholders where necessary to do so in order to prevent such fraud and wrong, will be held guilty;

Minor premise: This corporation, *considered as a corporate entity*, has itself performed *ultra vires* acts to the fraud upon and wrong of the State:

Conclusion: Therefore this corporation is guilty.

A palpable *non sequitur*. All that it was necessary to hold, and therefore all that was *decided*, in either of these cases, was, that where a corporation in its corporate capacity does *ultra vires* acts, it must answer to the State therefor.

But the dicta in these cases do not support the lower Court's ruling herein. They are simply assertions that while the general rule is that corporation and stockholders are separate and distinct, yet the exception to the rule is that, *to prevent fraud and wrong*, they will be considered identical. The very rule and exception which we have insisted on. The lower Court herein invoked the exception, not to prevent fraud or wrong (the only reason for ever invoking it), but to permit the escape of the defendants from the consequences of their fraud and wrong. It may be stated as an absolutely universal rule that the exception can never be invoked *to free a defendant from the charges made in the complaint, but only to bring the corporation within the scope of those charges*. It is also universally true that the exception, whenever it applies at all, applies *against* the corporation, never *in favor of* the stockholders.

Therefore neither decision nor dictum in either of these cases supports the action or the reasoning of the lower Court herein in ruling on the demurrer.

But a still further reason, and a most cogent one, why the Ohio case and the New York case do not and could not support the reasoning or the action

of the lower Court herein, is that those cases were by the State against the corporation. They were by a third party. Here there is no third party. The question lies between the two parties only—corporation on the one hand, and stockholders on the other. We do no more than allude to this point at this time because we discuss it fully hereinafter.

D

The Doctrine that In Pari Delicto Potior Est Conditi- o Defendentis Has no Application to This Case

While the lower Court relied mainly on the theory that a corporation and its stockholders are identical, and mistakenly called the Ohio case and the New York case to the support of its ruling, the counsel for defendants herein, though they also have ridden that horse hard, have not been content to ride that horse only. They have attempted in argument in the lower Court, and may attempt here, to bestride another one which runs in the opposite direction. They say that if the defendants were guilty as charged in the complaint, the Washington Company, of which they were and are the stockholders, was equally guilty—*in pari delicto*.

Now, of course, the expression *in pari delicto* not only involves but *is* a comparison between two terms—here, between stockholders and corporation. If those terms are identical, if the stockholders *are* the corporation, then there are not two terms, but only one, and it becomes impossible to apply the phrase *in pari delicto*. Any attempted application of it

would be unmeaning. Whatever in thought is necessarily unmeaning, is absolutely impossible. Therefore, as a basis for the argument that the corporation was *in pari delicto* with the defendants, the defendants' counsel have been driven to postulate not only the separate and distinct identity of the Washington Company, but such an identity as could think, devise, scheme, and commit torts. Since the legal theory of identity of corporation and stockholders, properly understood and applied, affords no ground for the action of the lower Court herein, it becomes necessary to inquire whether, though the Court did not itself rely on it, this other and contradictory theory of *in pari delicto* will sustain the lower Court's ruling on the demurrer.

If the facts of this case, as alleged in the complaint, presented any such question, we would say that it is absurd to assert that, where all the stockholders thrust a corporation into an *ultra vires* and wrongful act, the corporation, *as between itself and them*, is *in pari delicto* with them. But here, in the conspiracy of September, 1909, for damages from which we are suing, the corporation had absolutely no part except the passive role of victim. It was neither *in pari* nor in any *delicto*. We freely admit that it had a part, as a corporation, in the conspiracy of 1905 and in the conspiracy of May, 1909, to acquire the First National Bank of Fairbanks. But commission of one crime does not prove commission of another and later one. Nor does the commission of one tort prove the commission of a

later tort. The most that proof of prior offenses can show is a state of mind, intention, or a habit or system. But the only mind the corporation can have is the mind of its directors, officers and stockholders; and we admit that in the minds of the defendant stockholders the intent and habit of violating the Anti-Trust Act existed and persisted all the time. It existed in September, 1909, but on that occasion it manifested itself differently than on all prior occasions—it manifested itself, not in the corporate acts of the Washington Company, but in their personal, individual acts of selling their stockholdings in that company. Therefore, there was no delict *by* the corporation, though, as the sequel showed, there was a most serious one *against it*. As the Court of Appeals of New York said in the *North River Sugar Refining Company* case (9 L. R. A. 40) :

“If * * * the stockholders, * * * one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth and the entire and exact truth, it is difficult to see wherein the corporation has sinned.”

Very difficult indeed! Nothing hinges, so far as this point is concerned, on the fact that the sale of stock herein was null and void. It is not the legality or illegality, the validity or invalidity, of that sale which controls, on this point. What controls is the *fact* that the defendants threw their corpora-

tion into the maw of the Moloch in this case, the Nevada Company. In the accomplishment of that fact the Washington Company had no part except the passive part of being the victim. Without any corporate action whatever on the part of their company, but purely by signing their personal names on the back of their stock-certificates, the defendants sacrificed their company. Their motive was not gain or advantage to their company but the quarter of a million dollars which they put, not into the company's vaults, but into their private purses. All of this appears upon the face of the complaint and is admitted by the demurrer.

While, as we have already stated, the proposition, that where the stockholders, directors or officers of a corporation cause it to do an *ultra vires* or wrongful act, it thereby becomes *in pari delicto* with them, has no bearing on this case, for here the corporation *did* no act, but *suffered* the act, yet counsel for the defendants may, in this Court, as they did in the Court below, assert that the corporation did an act, not merely suffered it. So let us consider their argument. Shutting our eyes for the nonce to the untruthfulness of their premise, and granting, for the sake of the argument only, that the corporation did an act *by and through the defendants*, namely, violated the Anti-Trust Law, then the question is whether, *as between the corporation and the defendants*, it is *in pari delicto with them*. The defendants say it is. We maintain it is not.

In the supposed state of the facts we freely admit

that *as to third parties*, injured by the act, the corporation as well as the defendants would be liable. In both of the cases above discussed, *State vs. Standard Oil Company* and *People v. North River Sugar Refining Company*, it was a third party who was complaining; namely, the State. But that is not the situation now under consideration. By the hypothesis we and the defendants have eliminated from view all third parties and limited our vision to the two parties here involved, the corporation and these defendants (its stockholders). As between them is there a *par delictum*?

It is not only perfectly possible but perfectly true that as between A and B, on the one hand, and C, on the other hand, both A and B may be liable to respond in damages or otherwise to C, and yet *as between A and B* the liability rests on A alone. That is a situation which occurs not infrequently.

A partnership may be rendered liable to third persons by the wrongful act of a partner, and thus another partner, himself unoffending, may be made to suffer. As to such third persons he, as a partner, is liable. But to a suit by him against the partner who acted wrongfully in creating the liability, the latter could not plead that the unoffending partner was *in pari delicto*. The common law on the subject is expressed in some of the codifications. Section 2431 of the Civil Code of California, for example, is as follows: "A partner is not bound by any act of a co-partner, in bad faith toward him, though within the scope of the partner's

powers, except in favor of persons who have in good faith parted with value in reliance upon such act.” Briefly, as to third persons he may be liable, but as against the offending partner he may have a right of action. But we now turn to cases where the principle has been applied to corporations and their stockholders.

In *Hill v. Murphy*, 212 Mass. 1, a corporation, acting by its officers and directors, published a libel. The person libeled sued the corporation, recovered damages against it, and the corporation paid the judgment. Then, because the corporation (being under the control of said directors and officers) would not sue these officers and directors, certain stockholders instituted a suit, in right of the corporation, against both the directors and the corporation to recover *in behalf of the corporation* the damages which it had sustained; namely, the amount of the judgment and costs and the expenses it had been put to in defending the suit against itself. And the plaintiffs recovered judgment in right of and in behalf of the corporation. There it had been judicially determined that the corporation was liable to the third person, and in that sense was guilty, but as between it and the persons who had made it guilty it was held entitled to recover. (It is true that the suit was in equity, but it should be noticed that this was for no other reason than that the stockholders were forced by the circumstances to sue in right of and to the use of the corporation because of the failure and refusal of the corpora-

tion's officers to sue, and of course the corporation was a necessary party and could be brought in in no other way than as a party defendant; if the corporation itself had sued it would clearly have been an action at law, to-wit, trespass on the case.) The case came before the highest Court of Massachusetts in 1912 on bill, demurrer to the bill, answer, and an agreed statement of facts. The Court said:

“*Clearly the bill sets out a cause of action in favor of the corporation against the defendant directors. When directors intentionally act ultra vires of the corporation, they are liable for the losses it sustains in consequence. Richardson v. Clinton Wall Trunk Manuf. Co., 181 Mass. 580. Greenfield Savings Bank v. Abercrombie, 211 Mass. 252, and cases cited. Leeds Estate, Building & Investment Co. v. Shepherd, 36 Ch. D. 787. Williams v. McDonald, 15 Stew. 392. And regardless of whether the publishing of the libel was within the powers of the corporation, the tortious act, alleged to be wilfully done by the directors to gratify their own personal ends, was a breach of the duty they owed as quasi trustees and it has resulted in loss to the corporation. The liability of directors is not limited to cases where the loss to the corporation results from fraudulent misconduct on their part, or where they have received financial profit which in equity belongs to the company. Von Arnim v. American Tube Works, 188 Mass. 515. Greenfield Savings Bank v. Simons, 133 Mass. 415.*”

The plaintiff in the libel case had also sued the directors but judgment in that suit had gone in favor of the directors. They pleaded that judgment in bar of the said suit by the stockholders in right of the corporation, but the Court held that the par-

ties and subject-matter were different and that the former judgment was therefore not a bar. The Court said (p. 4):

“In that proceeding the question was whether the defendants were individually liable to Hill; in the present one the corporation seeks indemnity *for the damages it suffered due to the misuse of their powers by the defendants while acting as its directors.*”

And the Court gave judgment for the plaintiffs. So that after a judicial determination in one case that the corporation was liable for the libel, and a judgment in another case that the directors were not liable for it to the person libeled, *the directors were nevertheless, in a third case, held liable to the corporation for the damages it sustained by their causing it to publish the libel.* Thus this Massachusetts case has an element of weakness not present in the case at bar. For here there has been no judicial determination that the defendants were not personally guilty of violating the Anti-Trust Act. Indeed, by their demurrer they admit, for all present purposes, that personally they did violate it, and their theory that the corporation is in *pari delicto* also admits that they violated it.

(In reading this case of *Hill v. Murphy* the official report should be used because the last paragraph of the opinion is inaccurately stated in 98 N. E. 781 and the headnote in the latter report is correspondingly misleading.)

In *De Neufville v. New York etc. Ry. Co.*, 81 Fed. 10, in the United States Circuit Court of Ap-

peals for the Second Circuit, the complaint alleged that the plaintiff was a stockholder of the New York & Northern Railway Company, and that, in pursuance of a conspiracy of that company and the New York Central & Hudson River Railway, to throw the said Northern Company into the possession and control of the said Central & Hudson, the Northern Company refused freight from shippers and from other companies offering it, and thereby cut down its income to such an extent that it could not meet its bond obligations, with the result that the mortgage securing the bonds was foreclosed and the conspiracy was consummated by the Central & Hudson acquiring control through the foreclosure sale. It is clear that the Northern Company, *as a corporation*, was a party to the conspiracy to bring about its own insolvency, though it did not plot its own ruin till it fell into the hands of the majority stockholders and bondholders, who were interested in the Central & Hudson. The plaintiff had conceived that he had a right of action personally for the damages he sustained as a stockholder. The Court, however, held that the right of action was in the corporation, and that, since the corporation was controlled by interests hostile to the suit, the plaintiff, a stockholder, could maintain it in behalf of and to the use of the corporation. Said the Court (p. 12) :

“The bill sets forth a cause of action in favor of the New York & Northern Railway Company, which might be prosecuted either by it, or, if its directors failed to do their duty in that

regard, then by one or more of its stockholders whose interest it is to have the corporation vindicate its rights.”

The suit was for the restoration of the railroad property to the Northern Company and for an accounting. It seems that both the two corporations and the majority stockholders of the Northern Company were made defendants. It is very apparent that the Court did not consider the corporation *in pari delicto* with the majority stockholders, because it said (p. 12):

“It is the property of the corporation which has been taken, and it is the corporation which is entitled to its return, or to an accounting for its proceeds.”

And on p. 13:

“The cause of action in favor of the corporation to recover its property being the only one supported by the facts pleaded in the bill, or cognizable by the court, and relief appropriate thereto being prayed for, the bill will not be dismissed as multifarious because complainant has also asked for other relief to which he may not be entitled.

“There is no force to the suggestion that the bill is defective in failing to ‘set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.’ In view of the averments that *defendants obtained control of a majority of the stock and bonds* on purpose to wreck the New York & Northern; procured, by resignation and election, a board of directors in harmony with that purpose, and which board did in fact, by refusing profitable business and

diverting traffic, accomplish such purpose—it would be an idle waste of time to urge the board of directors, or the majority stockholders who initiated and consummated the fraud, to bring suit in order to secure judicial condemnation of their own actions.”

One of the strongest cases to be found illustrating the principle that a corporation is not *in pari delicto* with its wrongdoing stockholders, or persons in control of it, who thrust it into illegal action, is *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254. That case was in the United States Circuit Court of Appeals for the Second Circuit, and is noteworthy in several respects: Firstly, like the case at bar, it was an action at law for triple damages under the seventh section of the federal Anti-Trust Act; secondly, the judge who wrote the opinion is acknowledged to be an authority on matters of corporation law and relations; thirdly, the defendants occupied the position held by the defendants in the case at bar, and they were represented by counsel most eminent in this branch of the law (and it is safe to assume that Mr. Johnson was assisted by Mr. John E. Parsons, since the latter was himself a defendant); fourthly, *by corporate action*, i. e., action taken by its board of directors as a board, the plaintiff company had participated in the conspiracy by which it complained it was injured. And the precise point on which the lower Court herein sustained the demurrer was presented and urged by counsel there, and overruled. The Court said (pp. 260-261):

“It is next contended that the complaint failed to show that the defendants did anything which was ‘forbidden or declared to be unlawful’ by the federal anti-trust statute. As already shown, however, the complaint charges that defendant combined and conspired to prevent the plaintiff from engaging in business and in interstate commerce; that they induced Segal to accept a loan from the American Sugar Refining Company and to pledge as security therefor a majority of the capital stock of the plaintiff corporation under such conditions that the American Company obtained the absolute voting power thereon; that the American Company used this power to elect directors favorable to the carrying out of the object of the conspiracy, and that such directors accomplished such object by voting that the plaintiff should not engage in business. The substance of the charge is that the defendants obtained the control of the plaintiff corporation to ruin it and to prevent it from ever becoming a competitor of the American Company, and that they carried out their unlawful purpose in violation of the trust imposed upon the majority stockholders for the benefit of the minority, and by inducing directors to be unfaithful in the performance of the duties of their office. In our opinion, the complaint sufficiently states a conspiracy in restraint of interstate trade and commerce within the meaning of the federal statutes. Indeed, no more effectual means to make a conspiracy effective could be devised than the manipulation, in the manner described in the complaint, of the control afforded by holding a majority stock interest—manipulation wholly in violation of the trust obligation of a majority stockholder to the minority and of the directors to all the stockholders.

“It is finally contended that, if the conspiracy was illegal, the plaintiff was a party to it, and

cannot maintain an action against the other parties. The answer to this contention is that *a corporation cannot conspire that its own directors shall be unfaithful to it*. Action which directors take in the name of their corporation, *detrimental to its interests and in bad faith*, is, with respect to them, the act of the corporation in name only. Directors and other persons entering into a conspiracy to obtain such action for wrongful and ulterior purposes are liable to the corporation for the damages caused thereby. Nothing is shown in this case to call for the application of the doctrine, '*In pari delicto potior est conditio defendentis.*' "

A corporation can no more conspire that its own stockholders shall be unfaithful to it than it can be unfaithful

an Corporation v. Negeanee Aid Society,
138 N. W. 343 (Mich.)

l. I. 136,
ar. The
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Warwick Bank * * * to recover from the defendant, formerly president of the bank, under the money counts, the value of certain moneys and securities of the bank, by him appropriated to his own use."

[We see no see reason why the receiver might not, under the general rule, waive the tort, and pursue the defendant for so much money had and received to the use of the bank.]

"The case was tried before the Chief Justice, with a jury * * * when it appeared in substance that the defendant, who was the president, and his brother, John A. Kenyon, who was the cashier of the Warwick Bank, *being the owners of all but a very few of the shares which*

composed the capital stock of that bank of \$25,000 only, sold out their interest in the bank to a company of persons from out of the State, for a bonus of \$11,000, of which the defendant's share was \$7,500, stipulating to receive, and receiving, all the valuable notes and checks of the bank, including their own, in payment for their stock and said bonus; the bank receiving in lieu thereof the notes of the purchasers.

* * *

“The presiding judge charged the jury * * * that in such a case, it could not be set up, in defence to the action of the receiver, that the bank was *in pari delicto* with the defendant.”

In the Supreme Court the defendant's counsel urged as error that (p. 138):

“The Court did not charge the jury, as requested, that if the transactions, involved in this suit, between the corporation and the defendant were illegal, and if the amount sought to be recovered had come into the possession of the defendant through such illegal transactions, that both parties were *in pari delicto*, and the plaintiff could not recover.”

To this objection the Court said (pp. 143-144):

“Again, it is objected that if the property of the bank came into the possession of the defendant in the course of an illegal transaction, that both parties are *in pari delicto*, and for that reason the plaintiff cannot recover * * *.

“In this suit between a bank and its principal officer, for abstracting, without warrant or value, all its assets, it is difficult to see how the parties can be *in pari delicto*—how *the victim can be equally in fault with the officer, who, in breach of trust, has abstracted its funds*. In such a contest, the only moral agent,—when, in

addition to this fraud, further fraud upon the public was designed,—was the officer, who was capable of reason as well as of discourse, and not the legal entity, whose interests he betrayed, and which was capable of neither. To talk about equality of wrong in such a case, would be, not only to shut our eyes to all *moral* distinctions, *but to the very nature of things*—both of which the common law is supposed to recognize.”

Furthermore, the Court recognized the legal entity of the corporation, in consonance with the principle which we have urged hereinbefore. For, answering another objection of the defendant’s counsel, the Court said (p. 142) :

“The second objection to the verdict, * * * wholly ignores *the existence of the bank as a legal entity*, created by law for certain purposes, possessed and required to be possessed of certain property and endowed with certain rights, to enable it to perform them, *and confounds the corporation with its creditors and corporators.*”

The observation quoted by the lower Court from the case of *Bishop v. American Preservers Co.*, 105 Fed. 845, to the effect that the plaintiff in that case could not recover because he had been a party to the illegal agreement, does not in any degree or way countervail the decision in the *Pennsylvania Sugar Refining Company* case, for several reasons, among them being that the plaintiff there was an individual, not a corporation, and therefore the question could not and did not arise as to whether if a corporation is thrust by its stockholders into an illegal transaction and suffers damages therefrom, it can recover against them, and also that the plain-

tiff there entered the combination of his own free will.

E

The Right of Action for the Injury to the Washington Company Is in the Corporation, not in the Stockholders

Not content with arguing (1) that corporation and stockholders are identical, and (2) that they are not identical but different, and the corporation is *in pari delicto* with the stockholders, counsel for the defendants may argue here, as they did below, (3) that if *all* the stockholders had not participated in the illegal transaction of September, 1909, then the non-participating stockholders, not the corporation, could recover from the participating stockholders for the injury which the former suffered. That is, that the right of action, if there is one, is in the stockholders, not in the corporation. The lower Court adopted this view, for it says (tr. p. 65):

“All the stockholders of this corporation, it is alleged, joined the combination. The receiver, then, represents no person who is directly interested who is not a party to the unlawful combination, and as such party to an illegal combination, cannot sue under the Sherman Act for damages which he has suffered.”

But it has been held expressly and repeatedly that a stockholder cannot recover for the indirect damages which he sustains (through depreciation of the value of his stock) by injury to the business and property of the corporation resulting from a violation, by others, of the Anti-Trust Act. In

Ames v. American T. & T. Co., 166 Fed. 820, 822, the Court said:

“Assuming merely for purposes of decision upon demurrer that the declaration alleges a violation of the Sherman Act, and that it properly alleges consequent damage, I am of the opinion that the injury set forth *is to the corporation, for which the corporation alone can maintain an action at law under the Sherman Act.*”

Loeb v. Eastman Kodak Co., 183 Fed. 704, 709; *Corey v. Independent Ice Co.*, 207 Fed. 459, 460, and *United Copper Securities Co. v. Amalgamated Co.*, 223 Fed. 421, expressly follow the *Ames* case, all of them being attempts by a stockholder to recover in his own name the damages to his stock's value which he claimed he sustained from a combination in violation of the Sherman Act. And see *Converse v. United Shoe Machinery Co.*, 185 Mass. 422, 70 N. E. 444.

Now if the corporation alone can maintain the action it is because the corporation, and it only, is directly injured, and these cases expressly so state. Suppose that there were but one “innocent stockholder”; would the measure of damages which the corporation could recover be the amount that he had lost by depreciation of his stock or otherwise? Clearly not; it would be the total amount which the corporation, as such, had suffered. Then, on the hypothesis of the lower Court and of the defendants herein, the existence of just one innocent shareholder (holding, let us say, one share) makes the

total damages sustained by the corporation a reality. The non-existence of such a shareholder makes such damages sustained by the corporation an unreality. The very absurdity of this proposition refutes it. The truth is that the existence or non-existence of the "innocent stockholder" makes no difference as to the corporation's right to recover. It is not true that a corporation is an association of persons and nothing more. It is that and much more. It is a legal person with obligations not only to stockholders but to creditors. And while the creditors cannot force the corporation to sue for the wrong done to it in violation of the Sherman Act, and while when a receiver sues it is in right of the corporation, not in right of the creditors, yet that is not to say that the creditors have no rights or interests in the matter. From the nature of a corporation and the rule respecting paying creditors before stockholders, the creditors have not only as much right and interest in the action as stockholders, but their right is prior to that of the stockholder. The action is no more in right of the stockholders than of creditors. Neither class can maintain it in its own right. The right of action is the corporation's only. But whatever is recovered goes first to the creditors until their claims are satisfied, and only secondarily to stockholders. The truth is, that while neither class can sue in its own right, both have interests in the action brought in right of the corporation. In the *Ames* case, already mentioned, 166 Fed. 820, 823, the Court said:

“The declaration alleges that the cable company is now in the hands of a receiver. It follows that upon recovery of damages for an injury to the corporation the fund belongs to the receiver for *application to the obligations of the corporation*. These obligations take precedence over the interest of the shareholder. The prior recovery by a shareholder, if permitted to diminish recovery by the receiver, would result in depriving creditors of the corporation, if there are any, of the assets properly belonging to them.”

The attitude of the courts and the correct principles of law on this subject of creditors' rights in a corporation are illustrated by the opinion in *Jackson v. Ludeling*, 21 Wall. 616, 624. Justice Strong, speaking for the Court, said of officers of a company who had conspired with a single bondholder to cause a sale of a railroad property, under foreclosure, at a grossly inadequate sum, in fraud of the rights of other bondholders and stockholders:

“As officers of the company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the trustees of the stockholders, *and also, to a considerable degree, of the bondholders*, owners of the mortgage. * * * They had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, *or even its bondholders*. Such a course was forbidden by their relation to the company. * * * They could not rightfully place themselves in a position in which their

interests became adverse to those of either the stockholders *or bondholders.*”

The error of the lower Court lay in assuming that the stockholders are “directly interested,” as the Court expressed it, while creditors are not (see tr. p. 65). Neither class is “directly interested,” as that term is technically used in legal discussion—the *Ames* case and other cases cited above hold this flatly as regards stockholders—but the interest of the creditors is even more *proximate* than that of the stockholders. Can the stockholders come in and say that they are the only persons interested in a recovery, and that they all participated in the wrong, and that any recovery would be but taking money out of one pocket and putting it into another, and thus block all action by the corporation, notwithstanding that a whole class of persons ranks ahead of them in its right to be paid by the corporation? We submit that the stockholders cannot do this. The corporation being a legal person with obligations first to class A and secondly to class B, said class B, when sued for a wrong done to the corporation, will not be heard to say, “The recovery would be for our benefit, would be taking money away from us and then paying it back to us, and the Court will not do such a useless thing.” They will not be heard to say that, because it is fundamentally untrue. *If it were true, the defendants herein would not seriously object to this action.* They would not strenuously resist paying money into court if it were to be paid right back to them.

The defendants have assumed one innocent stockholder, in arguing this matter in the lower Court. Let us assume *all* the stockholders innocent *except one*. That one, with outside persons, enters into a conspiracy in restraint of trade and commerce, through and by which conspiracy his company is injured. Will the fact that he is a stockholder, and therefore will himself share, *as such*, in the benefits of a recovery against himself, keep his company from having a valid right of action against him? Suppose now, that he owns a majority of the stock in his company, will not the company still have a right of action against him? Let us alter the supposition. Suppose that instead of there being but one guilty stockholder, the majority of the stockholders entered into the unlawful conspiracy, will that fact preclude a recovery? Certainly not; and no more will the fact that all of the shareholders, to benefit some alien or ulterior private interest of their own, enter into the conspiracy. The corporation as such is as much injured as if only one shareholder, holding but one share, were guilty of participating in the conspiracy. The interests of the shareholders, as such, receive the same indirect injury through the injury to the corporation, when all are guilty of the conspiracy as when one only is guilty, notwithstanding that some other and alien interest of the shareholders is benefited. It may be that all of them are interested in two companies, A and B. It may be that it is to their private interest as holders of B's stock that A be destroyed. They may enter into a conspiracy with

other persons to destroy A, and actually destroy it, in violation of the Sherman Law. They may be made the richer thereby. But their interest, as owners of A's stock, has been injured, and A has been ruined, nevertheless. And corporation A has a right of action against them for it is a legal entity, a legal person, separate and apart from them, a focus or center of rights and liabilities, including other liabilities than those to the stockholders and including other rights than those against non-stockholders. To say that if an outsider does a certain thing he is liable under section 7 of the Sherman Law, and that if one, or a majority, or all but one, of the stockholders do that same thing they are similarly liable, but that if all of the stockholders do that identical thing not one of them is liable under that section, is, we submit, a preposterous assertion.

F

The Intention of the Defendants Included the Intent to Destroy the Washington Company

We cannot leave this branch of the case without discussing briefly the lower Court's remarks (tr. p. 67) regarding the purposes of the conspirators. In the first place, it is apparent on the face of those remarks, as almost everywhere else in the opinion, that the Court did not distinguish the conspiracy of September, 1909, from the earlier ones. If the Court's statements had been confined and applied to the original conspiracy of 1905, they would, in the main, be true. But they become, we respect-

fully submit, irony and mockery when applied to the facts of the conspiracy of September, 1909. Viewed in the light of the allegations of the complaint, admitted by the demurrer, that “said Nevada Company, with the knowledge and consent of the defendants herein, and each of them, took from the said Washington Company all of its assets and dissipated, wasted and converted the same, which assets have never been, in part or in whole, repaid or restored to the said Washington Company” (tr. p. 36), it seems ironical indeed to say, “the business was operated with a view to enhancing the earnings, and the Washington Company was not depressed nor discriminated against, but *was given the business consideration of the conspiring bank which acquired the stock*. It does not appear that the failure of the banks, or either of them, was caused by the conspiracy, but rather, in spite of it.” And, “It would appear that the purpose of the conspiracy was against the public and not against either of the corporations” (tr. p. 67).

The defendants admit by their demurrer that, so far as they could, they sold their stock to the Nevada Company (tr. pp. 24-29); that they knew the Nevada Company was grossly insolvent at the time (tr. p. 33); that they surrendered the offices and trusteeships of the Washington Company to appointees of the Nevada Company (tr. p. 35); and that then the Nevada Company, with the knowledge and consent of every one of the defendants herein, took, dissipated, wasted and converted all the assets of

the Washington Company (tr. p. 36). And all this was done, they admit, in pursuance of a conspiracy to limit, restrain, and control the banking business at Fairbanks and environs. By these admissions they admit that it was a part of their intention that the Washington Company should thus be despoiled and pillaged. Of course the "purpose" of the defendants and the owners of the Nevada Company was to make money or get hold of it by some means or other. That is the purpose of the highway robber also. But the full scope of any purpose or intention includes all the means designed and intended to accomplish that purpose. It was the purpose and intention of the defendants to ruin the Washington Company just as truly as it is the purpose and intention of the highwayman to use the means which he employs to get money. Even if the defendants had not admitted by their demurrer that it was with their knowledge and consent that the Nevada Company took and converted the Washington Company's assets, they would be liable for the losses which their company sustained, because they deliberately turned it over to another company which was insolvent, and therefore irresponsible. It was a wrongful, unlawful act to permit *any* other company thus to obtain control of their company.

The defendants have by their demurrer admitted the allegations of the complaint that the surrender of their corporation to the Nevada Company proceeded from wrongful and unlawful motives and purposes, but apart from such admission the very

act itself speaks and declares that the intent was to place the Washington Company in the entire control of the Nevada Company so that the latter might do therewith as it chose. The act itself therefore proclaims the wrongfulness and illegality of the transaction.

Anglo-American Land etc. Co. v. Lombard,
132 Fed. 721, 736;
Caffrey v. Darby, 6 Ves. 496;
Cocker v. Quayle, 1 R. & M. 535;
Fyler v. Fyler, 3 Beav. 568;
Kellaway v. Johnson, 5 Beav. 324;
Munch v. Cockerell, 5 M. & Cr. 212;
Gibbons v. Taylor, 22 Beav. 344;
2 Lewin on Trusts, *p. 907.

True, these cases were in equity, but the forum wherein it is enforced neither adds to nor subtracts from the principle of law here involved. Nor are the defendants saved from liability by the fact that it was the Nevada Company which, with the defendants' knowledge and consent, pillaged the Washington Company. The whole scheme contemplated this, because it was a natural and probable consequence of the defendants' surrendering control of their company to another company, and therefore the defendants are liable for the resultant damage. For that the agency which wreaks the damage is human, not inanimate, does not free the defendants from liability where the action of that agency is made possible, natural and probable by

the acts of the defendants. In *Anglo-American Land etc. Co. v. Lombard*, just cited, the Court said:

“Where it is not otherwise provided, the implication in a grant of corporate power and life is that the corporation shall exercise its powers and carry on its business through its own officers and employees, and not indirectly, through another corporation operated under its control, and that it shall maintain an independent corporate existence, and not surrender the control of its affairs or the exercise of its powers to another corporation. Conceding that a corporation of a private character, not charged with any public duties, may, in pursuance of appropriate action on the part of its stockholders, sell all of its property, wind up its affairs, and permanently retire from business, still, in the absence of express authorization, neither the corporation *nor its stockholders* can, incidental to the sale of its property *or otherwise*, clothe another corporation with the right to maintain the corporate life or exercise the corporate powers.”

In *Angle v. Chicago etc. Ry.*, 151 U. S. 1, 14, Justice Brewer, delivering the Court’s opinion, quotes approvingly from Lord Justice Brett’s opinion in *Bowen v. Hall*, 6 Q. B. D. 333, 337, as follows:

“Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act

complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him."

As was said by the New York Court of Appeals in *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 165:

"The loss of money by the corporation subsequent to the conspiracy, and in consequence thereof, through the wrongful acts of the defendants' successors, placed in office by their treachery, was the natural, and therefore the expected, result of the conspiracy itself."

As to the intent to limit, restrict and control the banking business at Fairbanks and environs, that is specifically alleged in the complaint (tr. pp. 8-9, 22, 24-25), and is therefore admitted by the demurrer; but, if that intent were not thus admitted, the admission of the other facts pleaded respecting gathering the banking business into the hands of the Nevada Company solely would be an admission of that intent for all present purposes. It was held in *Standard Oil Co. v. United States*, 221 U. S. 1, 75, that

" * * * the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, *in and of itself*, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over

the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed.”

Apart from the specific intent to restrain the banking business, charged against the defendants, the direct, natural and necessary tendency of the *acts* charged against them, and admitted by the demurrer, was illegally to restrain the business of banking within the region described in the complaint. And where such is the direct, natural and necessary tendency of acts, the Anti-Trust Law is violated, as the courts have repeatedly held.

Standard Oil Co. v. United States, 221 U. S. 1;

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234;

Standard Sanitary etc. Co. v. United States, 226 U. S. 20;

United States v. Trans-Missouri Freight Assn., 166 U. S. 290;

Bigelow v. Calumet & H. M. Co., 167 Fed. 704, 167 Fed. 721.

Conclusions Deduced from Foregoing Argument and Authorities

We submit that the inevitable conclusions from the authorities and the allegations of the complaint are:

- (1) That the conspiracy of September, 1909, was

separate and distinct from the earlier conspiracy of 1905 and from that of May, 1909;

(2) That the Washington Company had no part in the conspiracy of September, 1909, except the passive part of victim;

(3) That the Washington Company is an entity separate and distinct from its stockholders, the defendants;

(4) That a court will never consider corporation and stockholders identical except to prevent wrong or fraud, and then only for the purpose of holding the corporation, as such, liable; never for the purpose of freeing the stockholders from liability;

(5) That even if all the conspiracies alleged in the complaint, including that of September, 1909, were considered as but one continuing conspiracy, and thus the Washington Company, even with reference to the transactions of September, 1909, and subsequently, became a violator of the Anti-Trust Act, it would be such violator thereof with reference to third persons only (the Federal Government, the Territory of Alaska, the State of Washington, the depositors and customers of each one of the banks)—it would not be such violator where the question is narrowed down so as to lie between the Washington Company and its own stockholders and directors—and that is where the question does lie in this case—as between *them* the stockholders and directors alone are guilty of violation of the law;

(6) By their demurrer the defendants have admitted a specific intent to violate the Anti-Trust

Law; but if they had not admitted such specific intent, their admission of the commission of the acts charged in the complaint is an admission for all present purposes of such intent, for not only was the direct, natural and necessary result of those acts to infringe that Law, but they did in and of themselves infringe it to the damage of the Washington Company, as is alleged in the complaint.

Therefore, the complaint states a cause of action against these defendants.

II.

This Action Was Commenced Within the Time Limited by Law

The other ground on which the Court below sustained the demurrer to the complaint was that the action was not commenced within the time limited by law (tr. pp. 67-71). We respectfully submit that therein the Court erred.

A

The Statute of Limitations Governing the Action Is That of the State of Washington

It is thoroughly settled that there is no statute of the United States fixing a limitation on actions under Section 7 of the Anti-Trust Act. Therefore, the case is governed by the statute of limitations of the state of the forum—Washington.

U. S. Rev. Stat., sec. 721;

Chattanooga Foundry v. Atlanta, 203 U. S. 390, 397;

Atlanta v. Chattanooga Foundry, 101 Fed.
900, 902, 904, 906, 910;

Atlanta v. Chattanooga Foundry, 127 Fed.
23, 28, 29;

Campbell v. Haverhill, 155 U. S. 610;

Brady v. Daly, 175 U. S. 148.

Such portions of the statute of limitations as might possibly be considered to have a bearing on this action, to-wit, sections or portions of sections 155, 159 and 165 of Remington & Ballinger's Annotated Codes and Statutes of Washington, are in the words following:

“§155. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.”

“§159. Within three years,—

* * * * *

“2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

* * * * *

“4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

* * * * *

“6. An action upon a statute for penalty or forfeiture, where an action is given to the party

aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty [limitation].”

“§165. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.”

The lower Court said (tr. p. 68):

“I think this case comes within subdivision 6 of Section 159, Remington & Ballinger’s Statutes of Washington, which provides that, ‘An action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State * * *,’ shall be commenced within three years. This is clearly an action for a penalty.”

There is an obvious difficulty about the lower Court’s view of the matter. If this action is for a penalty, then sections 721 and 1047 of the Revised Statutes of the United States grip it and take it from the control of *any* state statute of limitations whatever. Said federal section 1047 would then apply and the limitation would be five years. But it has been distinctly held by the highest authority that actions under section 7 of the Anti-Trust Law are not for a penalty, but are remedial. Such actions are simply civil remedies for private injury, and the damages recovered are compensatory and exemplary.

Chattanooga Foundry v. Atlanta, 203 U. S. 390, 397;

Strout v. United Shoe Machinery Co., 195 Fed. 313, 317;

Noyes on Intercorporate Relations, §410.

In *Chattanooga Foundry v. Atlanta*, just cited,

Justice Holmes, who delivered the Court's opinion, said:

“The limitation of five years in Rev. Stat. sec. 1047, to ‘any suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States,’ does not apply. The construction of the phrase ‘suit for a penalty,’ and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington v. Attrill*, 146 U. S. 657, 668; *Brady v. Daly*, 175 U. S. 148, 155, 156.”

These cases of *Huntington v. Attrill* and *Brady v. Daly* show clearly why actions such as the action at bar are not penal.

In *Strout v. United Shoe Machinery Co.*, just cited, the Court said:

“Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages.”

In view of the unequivocal ruling of the Supreme Court of the United States in the *Chattanooga Foundry* case, quoted above, and of the thorough and convincing discussion of the nature of a penal action which occurs in the cases of *Huntington v. Attrill* and *Brady v. Daly*, cited by Justice Holmes, we would not be justified in dwelling longer on this

point. With all respect to the lower Court we must conclude that this action is not penal in nature and subdivision 6 of section 159 does not control it.

But it is sufficient for our immediate purposes to have it settled that one of the limitations prescribed by the State statute does apply. This is fully settled by the above authorities. And we will defer a detailed examination of the sections of the Washington statute above quoted until we shall have considered features of the case at bar, which, we firmly contend, bring the date of the commencement of this action well within the shortest period named in those sections—two years.

The complaint charges that in pursuance of a conspiracy to restrain trade and commerce in a territory by concentrating, limiting and controlling the banking business at Fairbanks and environs, the Washington Company, and its business, assets, property, and apparently its identity, were turned over to and sunk in the Nevada Company, (1) by the act of the defendants in “selling” their stock in the former company to the latter company, (2) by the act of the defendants in surrendering the directorate of the Washington Company to the Nevada Company’s appointees (tr. pp. 25-26, 35-36), (3) by the managing and active stockholders, directors and officers of the Washington Company agreeing not to start any other or new bank, or affiliate with any competing bank, at Fairbanks or in that region (tr. pp. 30-32), and (4) by means of a pretended consolidation of the two companies, and a change of

name of the Nevada Company by which it took and assumed the name of the Washington Company (tr. pp. 37-38); each and all of these things being done by the action or with the participation or with the active consent and approval of the defendants, and each of them; and as a result thereof all of the assets of the Washington Company were taken, dissipated, wasted and converted by the Nevada Company (tr. p. 36).

The complaint further alleges that the pretended consolidated concern closed its doors, and that the Court in Alaska, being deceived by the defendants' conduct into believing that the Washington Company had lost its identity in the Nevada Company (and all others with any possible interest in the matter, except the defendants and their co-conspirators, being likewise deceived), appointed a receiver for the Nevada Company only; and it was not until 1915 that it was discovered that the Washington Company had not lost its identity or been merged in the Nevada Company but was a subsisting corporation, with rights and liabilities, and, consequently, it was not till that year that a receiver was appointed for the Washington Company and that its affairs were disentangled, so far as possible, from those of the Nevada Company (tr. pp. 38-45).

Notwithstanding that the books and papers of the Washington Company came into the hands of the person who was appointed receiver of the Nevada Company in 1911 and continued in his hands until 1915, the said receiver of the Nevada Company had

absolutely no legal power, right or authority in any way to represent or sue for the Washington Company; and it is apparent, therefore, on the face of the complaint that at all times from 1909 until 1915 the Washington Company was under the complete domination of the defendants and their co-conspirators and that it had absolutely no representative who *could* sue in its behalf or enter suit in its name except the defendants themselves, and, further, that during all of that time the conduct of the defendants themselves prevented the appointment of anyone—prevented accession of anyone to the control of the corporation—who could have sued in behalf of the corporation or in its name.

From these facts several principles emerge for consideration: (1) Notice to or the knowledge of a stockholder, director or officer of a corporation while not engaged in and about the business of the corporation, is not notice to or the knowledge of the corporation itself; (2) a corporation is not charged with notice or knowledge of facts of which a stockholder, director or officer has notice or knowledge, where the transaction is one in which the stockholder, director or officer is acting adversely to the corporation; and if the transaction gives rise to a cause of action in favor of the corporation and against such stockholder, director or officer, the statute of limitations does not run against such cause of action so long as the corporation remains under the domination or control of such stockholder, director or officer, or of those who are in like interest with

him; (3) where a disability to sue occurs (whether that disability arises out of inability, imposed by a superior power, on the part of the plaintiff to act, or out of his inability, imposed by a superior power, to reach the defendant by suit), the statute of limitations does not run until the disability is removed; (4) and where such disability has been caused by one against whom the cause of action existed, or where the latter by any conduct induced or caused a withholding or postponement of suit, he is estopped to say that the statute of limitations ran during the time the disability existed or the suit was withheld.

B

Unless a Transaction Is in and About a Corporation's Business, Notice to or Knowledge of a Stockholder, Director or Officer, Is Not Notice to or the Knowledge of the Corporation.

The "sale" of their stock by the defendants was their private transaction. The corporation, by the transfer of the stock on its books, would have been charged with notice that there *was a transfer* of the stock from one person to another, if it had not been for the operation of principle (2) above stated; to-wit, that a corporation is not so charged where the transaction is intentionally adverse to its interests. But even if it were charged with notice of such transfer, it is clear that notice or knowledge of the motives and purposes actuating the defendants in that stock transaction cannot be imputed to it. Those motives and purposes were the personal, priv-

ate designs of the defendants—their design and desire to obtain for their shareholdings two and one-half times the real value thereof, and at the same time to concentrate the banking business in the hands of the Nevada Company by permitting and facilitating the absorption of the Washington Company and its assets into the Nevada Company. For the distinction between action by a stockholder *qua* stockholder and action by him in his private capacity we refer back to pages 19-28 of this brief and the citations and quotations there given. Where the transaction is that of the stockholder in his private capacity, not *qua* stockholder, the corporation is not chargeable with notice or knowledge of any wrongfulness, unlawfulness, defect or invalidity infecting the transaction.

- Reid v. Bank of Mobile*, 70 Ala. 199, 211;
Penfield Inv. Co. v. Bruce, 132 Mo. App. 257,
 111 S. W. 888;
Gregmore Orchard Co. v. Gilmour, 159 Mo.
 App. 204, 213-214, 140 S. W. 763;
Lanning v. Johnson, 75 N. J. L. 259, 69 Atl.
 490;
Keenan v. Dubuque etc. Ins. Co., 13 Iowa 375;
Mercier v. Canonge, 8 La. Ann. 37;
General Ins. Co. v. United States Ins. Co., 10
 Md. 517, 69 Am. Dec. 174;
Custer v. Tompkins, 9 Pa. St. 27;
In re Plankinton Bank, 87 Wis. 378, 58 N. W.
 784;

Davis etc. Wheel Co. v. Davis etc. Wagon Co.,
20 Fed. 699;
Reed v. Munn, 148 Fed. 737, 755;
Angell & Ames on Corp., §307.

A closely cognate principle is that the knowledge or notice of its officer or agent is not imputed to a corporation except in those matters which are within the scope of his authority, and which it is the agent's duty to communicate to his principal.

Schwabacher Bros. & Co. v. Murphine, 74
Wash. 388, 133 Pac. 598;
Moon Bros. Carriage Co. v. Devenish, 42
Wash. 415, 85 Pac. 17;
Corbet v. Waller, 27 Wash. 242, 67 Pac. 567;
Robertson Lumber Co. v. Anderson, 96 Minn.
527, 105 N. W. 972;
Luling etc. Co. v. Lane etc. Co., 49 Tex. Civ.
App. 534, 109 S. W. 445;
Mechem on Agency, §§718, 719;
Story on Agency, §140;
Angell & Ames on Corp. §309.

Here it cannot possibly be said that the "sale" of the stock by these defendants or the "consolidation" or the turning over of the Washington Company's assets to the Nevada Company, or any of those transactions, were at all within the business of the Washington Company; therefore, they could not be within the scope of the authority of the defendants considered as its agents.

C

Where the Stockholders, Directors or Officers, Are Acting Adversely to the Corporation, Knowledge or Notice Which They Possess Is Not Imputable to It; and If Their Acts Give a Right of Action in Favor of the Corporation Against Them, Time Does Not Run Against Such Right of Action so Long as They or Those in Like Interest Remain in Control of the Corporation.

Even if the "sale" of the stock had been in and about the business of the Washington Company—had been a corporate matter—the knowledge and notice of the defendants, its stockholders, directors and officers that it was a null and void transaction would not have been imputable to the company for the very reason that it was intended, calculated and adapted, as the complaint in effect charges, to defraud the Washington Company. This statement applies in full measure also to the "consolidation" and to the actual absorption and conversion of the Washington Company's money and assets by the Nevada Company. For in and during all of these transactions, since every one of the corporation's directors, officers and stockholders was party to the plot and fraud, the corporation had no one connected with it in any capacity notice to or knowledge of whom would affect it. They and all their acts were hostile to it and its interests; they were seeking to destroy its identity, its corporate life; neither their acts nor knowledge of their acts, nor notice of the purposes and ends inspiring those acts, can be imputed to the Washington Company. And until

someone came into control of the company who could sue, time did not run against the cause of action which those acts gave rise to in favor of the corporation. The rule that ignorance of the existence of a cause of action does not toll the statute has no application here; a corporation has no mind, no intelligence apart from its agents, and this rule does not apply where the very agents or minds through and by whom *alone* the plaintiff could know of the existence of the cause of action have turned against the plaintiff and are themselves the defendants.

In re Fitzroy Bessemer Steel etc. Co., 50 Law Times (N. S.) 144;

Coxe v. Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626, 627;

American Surety Co. v. Pauly, 170 U. S. 133, 156;

High v. Opalite Tile Co., 184 Fed. 450;

In re Senoia Duck Mills, 193 Fed. 711;

Oregon etc. Co. v. Grubissich, 206 Fed. 577;

Davis etc. Wheel Co. v. Davis etc. Wagon Co., 20 Fed. 699;

Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170;

Whittle v. Vanderbilt M. & M. Co., 83 Fed. 48;

Brooklyn Distilling Co. v. Standard D. & D. Co., 105 N. Y. S. 264, 267;

Same Case, on Appeal, 193 N. Y. 551, 86 N. E. 564;

Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326;

United Security etc. Co. v. Central Nat. Bank, 185 Pa. St. 586, 40 Atl. 97;

Seaverns v. Presbyterian Hospital, 173 Ill. 414, 50 N. E. 1079;

Johnston v. Shortridge, 93 Mo. 227, 6 S. W. 64;

First National Bank v. Christopher, 40 N. J. L. 435;

Stevenson v. Bay City, 26 Mich. 44;

Wickersham & Keith v. Chicago Zinc Co., 18 Kan. 481.

Of course it is the rule that in a court of law the directors and officers of a corporation are viewed as agents and the corporation as the principal. And the law is thus stated in *American Surety Co. v. Pauly*, cited above, where the extent to which a corporation was bound by its officer's knowledge was under discussion:

“The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, *but to subserve simply his own personal ends or to commit some fraud against the principal.*”

In *Davis etc. Wheel Co. v. Davis etc. Wagon Co.*, 20 Fed. 699, the Messrs. Davis had sold their inventions to the defendant corporation, but afterwards,

with several other persons, organized another company, to-wit, the complainant, and sold the same inventions to it. The question was whether the complainant corporation was charged with notice of the prior sale. The Court said (p. 701) :

“There is no evidence here to show what took place between the Davises and the other directors or officers of the complainant in regard to the purchase of the inventions, or whether the Davises took any official part in the transaction which resulted in the issuing of the letters patent to the complainant. The defendant relies on the mere fact that they were directors when the corporation derived its title, and insists that this circumstance alone is notice to the corporation of the infirmity of the title it obtained. This is not enough. It cannot be assumed that they participated as directors when they were representing their own interests as parties contracting with the corporation; and it would be most unreasonable to charge the corporation with notice of facts within their knowledge, but which it was not for their interest to communicate to the officers or to their co-directors. They were selling to the complainant what they had already sold to another, and, if they had communicated the facts, the corporation would have purchased only a worthless title. If they had imparted their knowledge to the other directors or officers they would have defeated the object in view. The general rule which charges a principal with the knowledge of his agent is founded on the presumption that the agent will communicate what it is his principal's interest to know and the agent's duty to impart. In the language of Mr. Justice Bradley, the rule ‘is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting

the subject-matter of the negotiation, and the presumption that he will perform that duty.' The *Distilled Spirits*, 11 Wall. 367. * * * Accordingly, it has been repeatedly adjudged that a corporation will not be charged by the knowledge of a director in a transaction in which the director is acting for himself, because he represents his own interests, and not those of the corporation."

In *High v. Opalite Tile Co.*, 184 Fed. 450, in the United States Circuit Court of Appeals, Third Circuit, the facts were as follows: Carter owned the great majority of the stock of the Mirick Company and was its president and manager. He was also vice-president and manager of the defendant Tile Company. Through his management the Mirick Company became indebted to the Tile Company for tile bought and money advanced. The advances from the Tile Company were unauthorized by its directors and fraudulent. Later the Mirick Company repaid most of these moneys, then became bankrupt. The trustee in bankruptcy sued for a return of the money thus paid back to the Tile Company, as an unlawful preference. The question was whether when the Tile Company received the money back it "had reasonable cause to believe that it was intended thereby to give a preference," within the meaning of the bankruptcy act. The Court said (p. 451):

"The advances which Carter made to the bankrupt company out of the funds of the defendant company were clearly unauthorized and fraudulent. As he owned practically all the capital stock of the bankrupt company, the advances were in his own interest, and opposed to

the interest of the defendant company. * * *
No officer or agent of the defendant company, except Carter, had any actual knowledge of these cash transactions. In his opinion the learned District Judge said:

“ ‘Carter was therefore in the position of having taken the money of the defendant company, of which he was an officer, and of having appropriated it to the Mirick Company, of which he was president. He was therefore standing in an antagonistic relation to his principal, the defendant company, and his conduct raises the clear presumption that he would not communicate the fact of his misappropriation of his principal’s money to it, but when he found his company insolvent he would attempt to restore the defendant’s money to it; the motive being to escape the criminal consequences of his embezzlement of the funds of the defendant company. Therefore in making the payment Carter was clearly acting for himself, and not for the defendant company, and his knowledge of the insolvency would not be the knowledge of the defendant company, and his intention to prefer the defendant company cannot be attributable to that company.’ ”

“This statement is in accord with *Lilly v. Hamilton Bank*, 178 Fed. 53, 102 C. C. A. 1, and many other cases that might be cited. The knowledge of Carter was not imputable to the defendant company.”

In *Oregon etc. Co. v. Grubissich*, 206 Fed. 577, decided by this Court in 1913, Judge Gilbert quotes approvingly from *McCaskill v. United States*, 216 U. S. 504, 514, as follows:

“Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders or officers. It may have interest distinct from theirs. Their interests, it may be

conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse their knowledge will not be attributed to it."

The case of *Brooklyn Distilling Co. v. Standard D. & D. Co.*, 105 N. Y. S. 264, is instructive in this connection. The plaintiff corporation leased its distillery to the defendant corporation, which was organized for the purpose of creating a monopoly in alcohol and spirituous liquors. Plaintiff's president, who was interested in defendant, knew of the illegal purpose for which defendant was organized and which induced it to take the lease. The defendant company paid rent for a time and then refused to either pay rent or surrender possession. The action was for the rent. The defendant company set up the illegality of the contract, alleging it was intended to give the defendant company a monopoly. Both the Appellate Division of the Supreme Court and the Court of Appeals of New York held that under the rule, that where the agent is engaged in doing an act against his principal's interest his knowledge will not be imputed to the principal, the knowledge of the plaintiff's president would not be imputed to the plaintiff corporation. The Appellate Division said (p. 267) :

"The foregoing discussion has been upon the assumption that the plaintiff knew the illegal purpose for which the defendant was formed and which induced it to make the lease in question. * * * The only evidence bearing on that

subject is that Matthiessen, its president (since deceased), had that knowledge, and it is claimed that the knowledge which he had is to be imputed to his principal. This is the general rule; *but it does not apply where the agent is engaged in doing an act against his principal's interest. Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326. It is undisputed that Matthiessen was largely interested in the defendant company. He was one of its promoters, directors, and a member of its executive committee. Appellant insists that in the negotiations which resulted in the execution of the lease Matthiessen acted, not in the interest of the defendant, but in the interest of the plaintiff, and therefore his knowledge must be imputed to the plaintiff, and yet it is insisted that the lease procured by Matthiessen is void, for which reason defendant cannot be compelled to pay the rent stipulated. If the lease were illegal and void, Matthiessen must have known it because he is presumed to have known the law, and, if he induced the plaintiff to execute it, knowing it to be void and unenforceable against defendant, being himself personally interested in the defendant, it cannot be said he was acting in the interest of the plaintiff. Either the lease is valid, in which case it is immaterial for whom Matthiessen acted, or else it is invalid because made for an illegal purpose. If the latter, it was made against the interest of the plaintiff * * * .”

And the Court of Appeals of New York, 86 N. E. 564, 565, in an unanimous opinion, said:

“Assuming that the scheme in aid of which the defendant corporation procured this lease was a combination in restraint of trade, was Mr. Matthiessen's knowledge of its nature imputable to the lessor under the circumstances? We think that this question must be answered in the negative, and that the defendant's appeal must,

therefore, fail. The case clearly falls within the doctrine declared by this court in *Benedict v. Arnoux* (154 N. Y. 715, 728), where it was held that *when an agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for his principal * * **. It is plain from the findings that what Mr. Matthiesen had at heart were the interests of the lessee in opposition to those of the lessor. His information, therefore, to the effect that the lessee's purpose was an unlawful one, assuming it to have been such, did not charge the lessor with knowledge of the fact."

The facts *In re The Fitzroy Bessemer Steel Co.*, 50 Law Times (N. S.) 144, decided by Justice Kay in 1884, were as follows: Smith, a promoter, and subsequently a director, of the steel company, made an arrangement with the syndicate of vendors of a mine by which he was to receive 1000 B shares in the company in consideration of his taking or placing 500 A shares. He subsequently received the 1000 B shares. Notice of this transaction was, after the formation of the company, given to the directors by means of a letter from the solicitors of certain shareholders, *but the board which received the notice consisted of persons more or less implicated in the transaction*, and no action was taken in the matter. The company was afterwards wound up and the liquidator brought suit to recover from Smith the value of the 1000 B shares, on the ground that his having received them was, under the circumstances,

a misfeasance as against the company. It was contended by Smith's counsel that the suit was barred by the statute of limitations because of the company having, through its directors, received notice of the transaction more than six years previously. The Court said:

“Now, I assume, and I think it is so, that the letter to the chairman gave sufficient information of the misfeasance of Mr. Samuel Smith, and, according to the case I have mentioned, laying that letter before the board would *prima facie* be notice to the company. But was it, in fact, such notice? The directors present at the meeting on the 4th June [when the letter was read to the board] were Messrs. Dyer and McLagan, and Colonel Holland. McLagan and Holland were two members of the syndicate who had made this arrangement to hand the 1000 B shares to Mr. Samuel Smith, and were the trustees of these shares under that arrangement, and Dyer was a director whose qualification had been provided for him by an arrangement not very dissimilar. Notice to an agent is not notice to the principal where it would be quite certain that the agent would not disclose the matter, and here it seems to me ridiculous to suppose that a board so constituted would make any such disclosure. The minutes of that meeting were read and confirmed at a subsequent meeting, at which the same directors and one other were present, but the letter was not read at that meeting. *I therefore reject the defense of the Statute of Limitations in this case because the respondent has not proved that the company had notice of the facts six years before this summons was taken out.*”

In *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373, 17 So. 626, 627, a company sued its president for an

accounting, and the statute of limitations was pleaded in defense. The Court said:

“The bill avers that he was its president, that he governed and controlled its management, and received and disbursed all its moneys, kept its books, and withheld them from the directors, and by evasion, deception and refusal, prevented an examination, until but recently, before the filing of the bill, when, for the first time, it was ascertained, that he was illegally and wrongfully absorbing the income for his own emolument, by improper and unauthorized credits. We are satisfied from the evidence that a failure to examine the books in the year 1878, *was due to his own conduct and representations*, and that the directors were lulled into a feeling of security by his representations as to the condition of the corporate affairs. We are of opinion that he occupied a fiduciary relation, partaking sufficiently of the nature of a trustee, to require him to deal fairly and openly with the corporation and directors in all his fiduciary duties; and in so far as they were lulled into non-action, from a reliance upon his statements, and his failure to disclose the fact that he was claiming credits not authorized by the directors, of which he knew they were ignorant, he cannot escape liability under the shelter of the statute of limitations.”

Mechem, in his work on Agency, second edition, §1347, says:

“The purpose of the statute of limitations in these cases is to protect the agent against the assertion of stale claims, but it ought not to be made the means of screening a guilty agent, by allowing him to set it up as a defense, *where the agent's own fault furnishes the cause of action, and the principal had no knowledge or means of knowledge that such a default had occurred.*

Where the agent * * * has been guilty of some misapplication or misappropriation of money or property which the principal had no reason to anticipate or suspect, it sounds very ill in the agent's mouth to plead the statute of limitations against the principal, until after the principal has learned of the wrong. To allow this is to sacrifice the principal to the guilty agent. The agent does not stand upon the same footing as a stranger. He is a person relied upon. He owes a duty. He is not dealing at arm's length. He disarms the ordinary diligence and watchfulness of the principal by undertaking to protect his interests."

D

Where a Disability to Sue Occurs (Whether That Disability Arises Out of Inability, Imposed by a Superior Power, of the Plaintiff to Act, or Out of His Inability, Imposed by a Superior Power, to Reach the Defendant by Suit) the Statute of Limitations Does Not Run Until the Disability Is Removed, and It is Immaterial That Such Disability Is Not Specifically Excepted from the Operation of the Statute.

A case resembling the case at bar in several respects is *Jackson v. Fidelity etc. Co.*, 75 Fed. 359. There the defendant had insured the fidelity and honesty of a national bank's president, cashier and bookkeeper. Thereafter these officers embezzled funds of the bank. The comptroller of the currency, by the bank examiner, took possession of the bank, and later, by action of the comptroller, a receiver was appointed. The comptroller, examiner and receiver, all had notice of the defalcations but did not know the specific details. The said officers of the bank, and others with them, constituting in all a

majority of the board of directors, were placed under arrest at the time the comptroller took charge of the bank, and the books of the bank were taken possession of by the prosecuting attorney. Later the receiver was discharged and the bank re-opened for business. The insurance contract provided that suit thereon must be brought within twelve months from the discovery of any defalcation. Suit was not brought until about eighteen months after the comptroller, examiner and receiver had notice, if not knowledge, of the embezzlements. The defendants demurred on the ground, among others, that the case was not commenced within time, and the lower Court sustained the demurrer. From that ruling the plaintiff sued out a writ of error. The Circuit Court of Appeals, Fifth Circuit, held that the statute was not running while the bank was in the hands of the government officers and that notice to them was not notice to the bank itself. It held further that the bank was not chargeable with notice through the guilty knowledge of the defaulting officers. The case is put upon the ground that inability to sue, so long as it exists, prevents the running of the statute, if such inability is imposed by a superior power. The Court said, at page 365:

“The fact that a majority of the directors were arrested and placed in a position where they were powerless to protect the interests of the bank under the allegations of the declaration raises no presumption against them. They are presumed to be the innocent sufferers from the acts of the guilty president and cashier until the contrary appears, and the failure of the

plaintiff to act at once is due to the fact that the United States attorney took and kept possession of the books and papers of the bank, to be used as evidence in a criminal cause. This delay is chargeable to the government. Justice requires that the case should be treated as one in which the running of the limitation was stopped by the conduct of the insurer itself, since the delay was the direct result of the evil conduct from which the insurer contracted to protect the insured."

That portion of the last sentence commencing with the word "since" is, we respectfully submit, too strong a statement. One member of the Court, Judge Pardee, thought so, and also thought that the receiver was the representative not only of the government but also of the bank, and that the statute, therefore, should be held to run after the receiver had notice of the thefts. With all respect to the majority of that Court, we believe that Judge Pardee was right in his position. But the implications necessarily involved in his dissenting opinion are fully as strong in support of the position we here take as the majority opinion. Indeed, we think them stronger. For he says, that if the conduct of the defendant has brought about "suspended animation of the corporation" and has thus prevented it from bringing suit, the statute does not run during such suspension of animation. We quote from page 366:

"The contention of the plaintiff in error, which is indirectly, if not directly, sustained by the opinion of the court, is that because of the appointment of a receiver by the comptroller of the currency, August 14, 1893, who took posses-

sion of the bank, its books and papers, and retained possession until May 21, 1894, the bank during that time was in a quasi state of suspension and incapacity, without agents through which to act, and unable to perform any corporate function. If this were true as a matter of law, it is difficult to see wherein it would affect the indemnity company, *unless, indeed, the indemnity company was chargeable with the suspended animation of the corporation.*”

So that in both the majority opinion and the minority opinion it is clearly stated that if the defendant is responsible for the “suspended animation of the corporation,” the statute does not run in his favor during the period of such suspension. That is exactly the case made by the complaint here, and for all present purposes the defendants here admit that the Washington Company’s life and activities were suspended, by their acts, from 1909 to 1915.

In *Greenwald v. Appell*, 17 Fed. 140, Judge McCrary says on the subject of suspension of the right to sue by the supervention of some superior power:

“The old rule upon this subject was very strict, and many authorities have been cited which clearly hold that if the statute of limitations begins to run, nothing will stop its running except something that is expressly provided in the statute itself; and it was formerly held that even a state of war was not sufficient; that an injunction against the creditor from bringing a suit was not sufficient to suspend the statute, and that it continued to run notwithstanding these things. That rule will be found laid down in *Angell & Ames on Limitations*, and I think in some other standard authorities. But the more modern rule is otherwise. It has been set-

tled now, by the decisions of the supreme court of the United States, that there are certain exceptions to the statute of limitations *other than those which are expressed in the statutes themselves*. The old rule has been qualified by later and better rulings, especially in the Supreme Court of the United States."

In the case before Judge McCrary the question was whether the running of the statute of limitations against a creditor's claim was suspended during the time that bankruptcy proceedings were pending against the debtor. Said the Court, after stating that the statute is suspended by the supervening of inability to sue, due to a superior power (p. 141) :

"I think this case falls within that doctrine. The right to sue was undoubtedly suspended during the pendency of proceedings in bankruptcy, and to say that the statute continued to run, would be to say that the plaintiff is deprived of his right to sue, without the slightest fault on his part."

To the same effect is *In re Eldridge*, 2 Hughes 256, 8 Fed. Cas. No. 4,331.

On this general subject the case of *United States v. Wiley*, 11 Wall. 508, 513, is a strong authority. The Court said in that case:

"True, the *right* of a citizen to sue during the continuance of the war was suspended, while the *right* of the government remained unimpaired. *But it is the loss of the ability to sue rather than the loss of the right that stops the running of the statute*. The inability may arise from a suspension of right, or from the closing of the courts, *but whatever the original cause, the proximate and operative reason is that the*

claimant is deprived of the power to institute his suit. Statutes of limitations are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have."

In *Braun v. Sauerwein*, 10 Wall. 218, 222, the running of the statute of limitations of Maryland was held to be suspended by the provisions of a federal statute, the Court saying:

"But in *Hanger v. Abbott* [6 Wall. 532] it was ruled, after grave consideration, that the time during which the courts of the recently rebellious States were closed to the citizens of other States, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, *and this, though the statutes contain no such exception.* In other words, it was held that the statutes of limitations of the insurrectionary States were suspended, while the courts in those States were closed by the war. Similar decisions have been made in the State courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; *that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue.* It seems, therefore, to be established, that

the running of a statute of limitation may be suspended by causes not mentioned in the statute itself.”

In *Devereaux v. City of Brownsville*, 29 Fed. 742, 750-751, the facts were that the legislature of Tennessee had attempted to enable municipal corporations of the State to evade the payment of their debts in full, and to that end had enacted laws disincorporating said municipalities and creating in their place “taxing districts” which were authorized to pay one-half of the “old debts,” which, it was declared, should be held a full discharge thereof. The courts held that these taxing districts were but the old corporations under a new name; that the said laws did not really effect a disincorporation, but only a change of name. But there was an hiatus between the disincorporating acts and the acts creating the taxing districts. And the question arose whether during that interval the statute of limitations ran against judgments obtained on the old debts prior to the disincorporation. Said the Court:

“The next defense set up is that one of the judgments is barred by the statute of limitations, it having been more than 10 years from the date of the judgment to the suing out of this mandamus, although other like writs have issued in the meantime. If the time elapsed between the repeal of the charter and the reorganization into a ‘taxing district,’ during which there was no organization to be sued, be excluded, the 10 years have not expired, and the bar has not attached. We have no hesitation in holding that it should be excluded, precisely as the time occupied by our late war was excluded,

and for precisely the same reason. If a state, with the deliberate and confessed purpose of doing that, repeals the charter of a municipal corporation to enable it to evade or avoid the writ of mandamus to enforce judgments against it, thereby disable the plaintiff from proceeding in the case, the time of disability should not be computed in the period of the statute of limitations. * * * *Hanger v. Abbott*, 6 Wall. 532; *U. S. v. Wiley*, 11 Wall. 508, 513,—where it was ruled that although the *right* to sue was unimpaired, the ‘loss of the ability to sue, rather than the loss of the right, stops the running of the statute.’ ”

Broadfoot v. City of Fayetteville, 124 N. C. 478, 32 S. E. 804, is very similar in its facts to *Devereaux v. City of Brownsville*, and the same conclusion was arrived at by the Court regarding the running of the statute of limitations.

The statutes of Tennessee forbid suit against the State. The tax laws provide that property on which taxes are delinquent shall be sold to the State, and that later the State may re-sell it to private persons. In *Collier v. Goessling*, 160 Fed. 604, 611, it was held that the statute did not run against a suit charging the sale to the State to be void, so long as the State had title or a pretended title under the sale, but that the statute began to run when the sale from the State to the private person took place. The United States Circuit Court of Appeals, Sixth Circuit, speaking by Judge Lurton, said:

“There was, therefore, no remedy of which the landowner could avail himself, whether in or out of possession, which would invalidate the tax sale and tax deed, so long as the equitable

title was in the state, and the state would not suffer itself to be sued in such way as to conclude itself. To start the running of a statute of limitation *there must be someone capable of suing*, some one subject to be sued, and a tribunal open for such suits. [Citations.] The State's title did not pass out of the State and into one capable of being sued until the deed of the clerk of July 10, 1902, to appellee. That was less than three years before this bill was brought. This suit to invalidate appellee's tax title was therefore not barred by the limitation relied upon."

The principle that while there is no one who can sue, or that while the plaintiff is incapacitated by a superior power from suing (and these are but two different ways of expressing the same general rule) the statute does not run, has been more frequently applied in favor of the estates of deceased persons than in any other class of cases. Thus A has a contractual claim against B which matures at a day certain. Before that day A dies intestate and the claim matures before an administrator is appointed. The statute does not begin to run when the claim matures but when the administrator is appointed. Another instance: A dies intestate. B takes possession of his estate and converts it to his own use. Later an administrator is appointed. The statute does not run against B for the conversion from the time when he took the property, but only from the time when the administrator was appointed and qualified. The principle underlying both these cases applies to the case at bar. For while it has been frequently held that if the statute starts running be-

fore the death of A, in our illustrations just given, nothing happening thereafter will stop its running, yet even that restricted and narrow rule will not avail these defendants, for here the cause of action did not arise, the statute did not begin to run, *before* the disability was imposed upon the Washington Company by the defendants and their co-conspirators, but *after* that event.

Of *Stanford's Case* and *Cary v. Stephenson*, 2 Salkeld 421, referred to in *Murray v. East India Co.*, 5 B. & A. 204, 7 E. C. L. 118, Abbott, Ch. J., says in his judgment in the *Murray* case:

“The first of these cases arose upon the statute of fines, 4 Hen. 7, c. 24; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term the grantee died; at the expiration of the first term, the lessor entered, and levied a fine *before administration granted*, and resolved, that the administrator should have five years, *for none had title to enter before*. The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate, *after his death, and before administration granted*; the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the Court was, that *the time of limitation did not begin to run until the grant of the administration*.”

And so in the *Murray* case, the Court held that under similar circumstances the statute did not begin to run on a claim accruing after the death of

the intestate, but before the appointment of the administrator, until the administrator was appointed.

In *White v. Blankenbeckler*, 115 Mo. App. 722, 92 S. W. 503, 504, A had died leaving personal property. B thereupon converted it to her own use. Held that time did not run in bar of an action for such conversion until a personal representative of A was appointed and qualified. The Court said:

“* * * the statute is not put in operation by one taking possession of property left by a deceased party and claiming it as his own. It does not begin to run until an executor or administrator is appointed. *The general rule is, to set the statute in motion, there must be some one, at the time, having capacity to sue.* * * * Where there is no one to sue, laches cannot be imputed.”

In *Stevenson v. Markley*, 72 N. J. E. 686, 695, 66 Atl. 185, 189, the suit was not brought until twenty-one years after the death of the party whose estate the plaintiff administrator represented. The plea of the statute was overruled, because the suit was brought very shortly after the administrator was appointed; the Court saying:

“The authorities hold that, where the cause of action did not exist during the life of the party and came into existence subsequent to the party’s death, the statute does not begin to run until the appointment of a representative. * * * The time between the death of the party and qualification of personal representative is not counted.”

In *McAuliff v. Parker*, 10 Wash. 141, 146, 38 Pac.

744, is the following statement by Judge Dunbar, speaking for the Court:

“The general holding of the courts is that the statute of limitations does not begin to run *until there is someone to sue* or liable to be sued.
* * * For instance, in case the action arises after the death of a party to a contract, then the statute would not begin to run until an administrator or representative was appointed.”

To the same effect as these cases are many others. Examples are:

Barton v. New Haven, 74 Conn. 729, 52 Atl. 403, 405;

Griesel v. Jones, 123 Mo. App. 45, 99 S. W. 769;

Root v. Lathrop, 81 Conn. 169, 70 Atl. 614;

McPherson v. Swift, 22 S. D. 165, 116 N. W. 76, 83.

We have referred to the rule followed by some courts that where the statute has once begun to run nothing happening thereafter will stop its running. But this is a rule which is perhaps more honored in the breach than in the observance. Certainly it is not universally followed. Thus, in *Alice E. Mining Co. v. Blanden*, 136 Fed. 252, 255, two promissory notes signed by Blanden matured nearly ten years before his death. The statutory period on such notes was ten years. Before suit was commenced against his representative the ten years expired, as to one note, if the interval between his death and the qualification of the representative was counted;

otherwise, the ten years had not expired. The Court said:

“The statute of limitations does not, in terms, provide that the death of a debtor after a cause of action against him has accrued shall suspend the running thereof; and in support of the demurrer the rule is invoked that, when the period of limitations has once commenced to run, it will not be suspended, except where the statute itself so provides. That such is the general rule may be conceded, but there are exceptions to it. Statutes of limitations are based upon the presumption that one having a legal claim will not delay enforcing it beyond a reasonable time if he has the power to bring suit upon it. Such reasonable time is therefore fixed and allowed. But the basis of the presumption is gone whenever the right or ability to resort to the courts or to bring the action does not exist. In such cases the creditor has not the time within which to bring his suit that the statute has given him, and the time that he is so prevented from suing upon his claim will not be included in computing the period of limitation.”

The condition of “suspended animation” to which the defendants and their co-conspirators reduced the Washington Company, and in which they kept it from 1909 to 1915, was very akin to duress, and during duress the statute does not run in favor of him who imposed it. In *Allen v. Leflore County*, 78 Miss. 671, 29 So. 161, where a wife had executed a deed to property in order to make good the alleged defalcations by her husband, an ex-county officer, from the county, and at the time of executing it she was laboring under duress induced by threats that her husband would be sent to the penitentiary un-

less his alleged shortages were made good, the Court held limitation against an action by her or her heirs to avoid the deed did not begin to run until the husband's death, since while he was alive the duress was still in force. To the same effect is *The Eureka Bank v. Bay*, 90 Kan. 506, 509, 135 Pac. 584.

In *Howard v. Carter*, 71 Kan. 85, 89-90, 80 Pac. 61, the facts were that an old man was alleged by the plaintiff, one of his heirs, after the old man's death, to have been of unsound mind and body and to have been unduly influenced to make deeds of all his property to two sons-in-law. The heir sued for cancellation of the deeds. The Court said (p. 63):

“The allegation of the petition is ‘that he was mentally weak at the time of the execution of the deeds,’ and that this condition had existed for more than eight years prior to his death. Being so mentally weak and under the influence of the sons-in-law, the statute of limitations would not run against him in their favor.”

National Bank of Commerce v. Wade, 84 Fed. 10, 15, was a case by a bank of Tacoma, Washington, against ex-directors for damages arising from the making of excessive loans, in violation of the national banking act, when they were in office. The case was in equity because of the complicated nature of the accounts to be examined. Judge Hanford said:

“I hold that in cases of this nature the statute of limitations will not begin to run *so long as the cestui que trust is under the control or influence of the trustee* (2 Perry, Trusts, 3d

ed., sec. 864, p. 512; 2 Pom. Eq. Jur., §1089), and as this suit was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations.”

It will not do to say that the Washington Company was not subjected to a superior power by the defendants. In the nature of things the combined wrongful action of all its officers, directors and stockholders *is* superior power, for a corporation can act in no other way than by them (for action for a corporation by a receiver is not action *by* the corporation, but in its behalf). Add to the fact that the defendants naturally *would not* act in its behalf, the other fact that they turned the corporation over to another company which not only *would not* but *could not* act in its behalf or legally cause it to act, and consider the reasons for this “would not” and “could not”—the conspiracy, the unlawful and *ultra vires* “sale” of stock, the “consolidation”—and it is just as apparent that the Washington Company was subjected to a superior power as that the bank in the above mentioned case of *Jackson v. Fidelity etc. Co.*, 75 Fed. 359, was subjected to such superior power when its officers and directors ceased to act for it and it went into the hands of government officers, and its books and papers were taken possession of by the prosecuting attorney. Here also the company fell into alien hands, not friendly, helping hands, as in that case, but hostile, piratical hands. Here also the books and papers of the company fell into other hands than

those of its own representatives—first into the hands of the Nevada Company and then into the hands of the receiver for the Nevada Company. The fact that here the impotence, the “suspended animation,” of the Washington Company was carefully and skilfully planned and designed by these defendants, does not make it less, but rather more, a case of “superior power” than where such suspension of animation was fortuitous, as in the said *Jackson* case. The fact that this suspended animation resulted from the acts of *all* its stockholders, directors and officers does not make it less a case of suspended animation through superior power than where it happens as a result of an act by a part only of its officers and directors, as in the *Jackson* case. The fact that it was brought about directly does not make it less such a case than where it comes about indirectly. As the Supreme Court of the United States said in *United States v. Wiley*, *supra*, “*whatever the original cause, the proximate and operative reason [for the stopping of the running of the statute] is that the claimant is deprived of the power to institute his suit*”; and as the same great Court said in *Braun v. Sauerwein*, *supra*, all these cases where the statute is held not to run “rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case”; and as Judge Pardee said in the said *Jackson* case, the statute will not run, *a fortiori*,

where the defendants themselves are “chargeable with the suspended animation of the corporation.” That is this case.

E

Where Disability to Sue Has Been Caused by Him Against Whom the Cause of Action Exists, or Where by Any Conduct He Has Induced or Caused a Withholding or Postponement of Suit, He Is Estopped to Say that the Statute of Limitations Ran During the Time the Disability Existed or the Suit was Withheld.

The interpretation of the statute of limitations given by the Supreme Court of the State of Washington is, of course, of controlling effect in this case, since it is that statute which governs. U. S. Rev. St., sec. 721; *Leffingwell v. Warren*, 2 Black (U. S.) 599.

In *Kreielsheimer v. Gill*, 85 Wash. 175, 147 Pac. 871, the Supreme Court of Washington, in an opinion written by Judge Chadwick, applied the doctrine of equitable estoppel to the limitation period. The case held that where a promise is made to pay as soon as a suit against a person secondarily liable is over, regardless of the outcome of that suit, and a creditor is thereby caused to delay the enforcement of his claim, an equitable estoppel is created so that the primary debtor cannot claim that the statute of limitations was running against the debt while the creditor thus forbore to sue. The Court quoted approvingly from 25 Cyc. 1016, as follows:

“The doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the statute of limitations, it

being laid down as a general principle that when a defendant electing to set up the statute of limitations previously by deception or any violation of duty toward plaintiff, has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold."

Of the doctrine of equitable estoppel 16 Cyc. 682 says:

"The term was borrowed originally from equity and hence denominated 'equitable estoppel.' Equitable estoppels are so called not, however, because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. The doctrine is recognized in the courts of common law just as much as in courts of equity, although it was at first administered as a branch of equity jurisprudence."

In another Washington case, namely, *Marshall-Wells Hardware Co. v. Title etc. Co.*, 89 Wash. 404, 409, 154 Pac. 801, 803, an action at law on a bond, the Court said:

"It is no doubt the rule that, where a fraud, or circumstances amounting to a fraud, prevents a party from maintaining an action against another, the equitable rule of estoppel will apply. The authorities are abundant to that effect."

It is the general rule that where one has prevented the bringing of suit against himself, whether by duress or a controlling influence over the plaintiff or by any means that would make it unfair and

unjust for him to say that the statute had run, he will be held estopped to set up the statute of limitations.

Voorheis v. People's Mut. Benefit Society, 91 Mich. 469, 474, 51 N. W. 1109;

Armstrong v. Levan, 109 Pa. St. 177, 1 Atl. 204;

Renackowsky v. Board of Water Com'rs., 122 Mich. 613, 81 N. W. 581;

Howard v. Carter, 71 Kan. 85, 80 Pac. 61;

Jenkins v. Jenkins, 94 Kan. 263, 146 Pac. 414;

Coxe v. Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626;

Klumpp v. Thomas, 162 Fed. 853.

Treasurer of Brown Co. v. Martin, 50 Oh. St. 197, 203, 205, 33 N. E. 1112, 1113, 1114, was a suit to enforce the payment of an assessment levied to pay for a public improvement. The owner of the land had, by a prior action, restrained the collection of the assessment. The question was whether time ran while the injunction was in force. The Court said:

“ * * * the question is whether or not a party may be permitted to set up the bar of the statute of limitations as a defense to an action the commencement of which he has wrongfully procured to be restrained until sufficient time has elapsed to render such a defense available at law. * * * It seems reasonable to conclude that it would be against conscience for a party to maintain a plea of the statute against an adversary, who, *by his procurement*, has been enjoined from prosecuting his suit. * * * No man should be permitted to

take advantage of his own wrong. * * * The delay complained of *was the result of the wrongful act of the defendant himself*, for which the plaintiff was in no way responsible, and it now comes with an ill grace for the unsuccessful party in that litigation to insist that the observance by plaintiff of that order of injunction and his obedience to it, shall work a defeat of his right of action because of such delay.”

In *Hayes v. Kenyon*, 7 R. I. 136, 141, hereinbefore referred to, where the president of a bank had sold it out, as these defendants sold out the Washington Company, to an irresponsible set of men for a large bonus, the receiver recovered judgment against the President; the Court saying:

“One would think, especially if this was done without authority even formally legal, that it was a wrong for which the bank itself might have redress, if it was ever rescued from the hands into which it had fallen so as to be able to seek it, and that the plaintiff might maintain this action as representing the corporation only.”

We submit that from the foregoing principles and authorities the conclusion is inevitable that time did not run against the Washington Company until 1915. Those principles, applied to the facts of this case, are: (1) The defendants, in the transactions of September, 1909, and subsequently, were acting (a) in their own *private interest*, and (b) *adversely* to the interest of the Washington Company, and until 1915 the company did not fall into the care of any one who *could*, in its behalf, take notice of or know

either those acts or their fraudulent, adverse character; and *because of the relation of principal and agent* existing between the corporation and the defendants, and the latter being the only source from, by and through whom, before 1915, it *could* have gotten or be charged with notice or knowledge of this cause of action, the statute did not run so long as that condition continued; and (2) by reason of the corporation being deprived of any one who would or could speak or act in its behalf and of being thrown into the hands of another company for the very purpose of being robbed and rendered impotent by the latter, which purpose was actually accomplished, the Washington Company *was disabled by a superior power* from suing on this cause of action until 1915, and whether such disability had been brought about by the defendants or not the statute would not have run until the disability was removed in 1915; and (3) the disability *having been brought about by the defendants themselves, they are estopped* to say that time ran before the disability was removed in 1915. These three principles may be respectively termed briefly, (1) suppression of knowledge by agent, (2) subjection to superior force, (3) prevention of action by the defendants themselves. Under each one of these principles, independently of the other two, the statute did not run until a receiver for the Washington Company was appointed in 1915.

And, in our view, the statute began to run from the time the receiver was appointed in Washington,

not from the time that he was appointed in Alaska; that is, in September, 1915, not in May, 1915. (See tr. pp. 42-45.) Washington is the domiciliary State of the Washington Company; and the principle of the case of *Pacific Coast Coal Co. v. Esary*, 85 Wash. 448, 148 Pac. 579, seems to be that no action could be brought in that State for the recovery of the general property of the corporation or on the choses in action belonging to the corporation generally, as distinguished from property and choses in Alaska, by the receiver appointed in Alaska. Therefore, under the foregoing principle that time does not run until there is some one who can sue, the statute did not run until the receiver was appointed in Washington. *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145, 148, is a case in point. A testatrix died in *New York* in 1822, owning stock in a turnpike company in *Connecticut*; her will was probated and her executors qualified in *New York* soon after her death. Nineteen years later, in 1840, administration was granted on her estate in *Connecticut*, and an administrator *cum testamento annexo* appointed. To an action brought by this administrator appointed in *Connecticut* against the turnpike company to recover dividends declared between 1826 and 1834 the defendant company pleaded the statute of limitations of six years; and it was held that the statute began to run against the claim only from the granting of administration in *Connecticut*, and that, consequently, the claim was not barred. The Court said:

“The dividends for which this suit is brought, it will be observed, accrued to Mrs. Startin’s estate after her decease, and before her will had been proved [in Connecticut] or administration taken on her estate [in Connecticut]; and more than six years previous to the commencement of this suit. But administration was not taken on her estate [in Connecticut] till 1840, much less than six years previous to the commencement of the suit. And the question is, whether the plaintiff’s claim is barred, by the statute of limitations. And this depends upon the answer to another question, namely, when did the statute begin to run against this claim? Was it when the dividends accrued, or when administration was granted on her estate? And this precise question was decided, in the case of *Murray v. East India Company*, 5 B. & A. 204 (7 E. C. L. 70) in which Abbott, Ch. J., in giving the unanimous opinion of the court of King’s Bench, after referring to the authorities and coming to the conclusion that they sustained the claim of the plaintiff, that the statute did not begin to run till the granting of administration, says: ‘Now, independently of authority, we think it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing.’

“That case was twice argued in the court of King’s Bench, and the question settled, upon great deliberation. We believe it to have been correctly settled.”

Though, under the foregoing authorities and the facts set out in the complaint and the conclusions which we think must be drawn from such authorities and facts, we deem it immaterial which section of the Washington statute governs this case, since the action is well within time whichever section applies, yet we will consider the statute, for it clearly

supplies a *fourth* distinct and independent ground for holding that time did not begin to run until 1915.

F

The Acts Described in the Complaint Were a Palpable Fraud on the Washington Company and the Statute Applicable to This Case Is the Fourth Subdivision of Section 159 of the Washington Code.

The estoppel which we have shown to preclude the defendants from claiming that time ran against the Washington Company on this cause of action, is independent of the provisions of the fourth subdivision of section 159 of the Washington Code. That the two are distinct cases of estoppel, each independent of the other, may be seen from an illustration: If A has a cause of action against B on a promissory note, and B, to keep A from suing, locks A up until the statute has run, B is estopped to set up the statute when the suit is afterwards commenced. Such a case, however, would not fall under sec. 159, subd. 4, which reads:

“§159. Within three years,—

* * *

“4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.”

So we say that, regardless of whether this case falls under sec. 159, subd. 4, the defendants are estopped from claiming that the statute ran before 1915, by reason of the fact that their acts amounted

to a physical prevention by superior power which kept the company from suing before that time.

If the corporation had possessed a mind independent of its stockholders, directors and officers, then the fact that the acts of the conspirators in September, 1909, and subsequently, were in the private interest of the conspirators and adverse to the Washington Company would naturally, through such supposed other mind, have been known to the company. But possessing no such other mind, that fact could not be known to the corporation. Therefore, *in the nature of things*, those acts and facts remained hidden and concealed, and were not discovered "by the aggrieved party," the corporation, until 1915 when the receiver was appointed.

Here we must notice briefly the mistake made by the lower Court in assuming that Mr. Noyes, as receiver of the Nevada Company, could have brought this action, or that any knowledge which Mr. Noyes, as the receiver of the Nevada Company or personally, may have had in some way affected and bound the Washington Company *before* he was appointed receiver of the latter company. Surely the fallacy of such a proposition is outstanding. The Court said (tr. p. 71):

"But in the instant case the facts were known
* * *. In fact, the complaint sets out the transactions at hand, all of which appear to have been in the possession of the plaintiff more than three years prior to the commencement of this action * * *."

Even if Mr. Noyes had known the facts in 1911,

how would that affect the rights of the Washington Company, or its receiver, in this action? He was not *its* receiver until 1915. It had no receiver until 1915. Until 1915 Mr. Noyes was as much an "outsider" as any "man in the street," so far as his right to enforce this cause of action or any other in behalf of the Washington Company was concerned. The Court says the facts were "in the possession of the plaintiff more than three years." Who *is* the plaintiff? The title of this case shows him to be "F. G. Noyes, *as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington.*" Now, the complaint shows that in Alaska that person came into existence in May, 1915, and that in Washington he came into existence in September, 1915. (See tr. pp. 42-45.) Suppose that after acquiring knowledge in the spring of 1915 (tr. p. 41) there had been no consolidation, and without being appointed receiver of the Washington Company, Mr. Noyes, who was then the receiver in Alaska of the Nevada Company, had brought an action against these defendants and in behalf of the Washington Company upon exactly the same cause of action as is stated in this complaint, how promptly the defendants would have demurred to the complaint under the provisions of section 259 of Remington & Ballinger's Annotated Codes and Statutes of Washington, which provides, "The defendant may demur to the complaint when it shall appear upon the face thereof * * * (2) That the plaintiff has no legal capacity to sue;" and

how certainly, and correctly, too, the lower Court would have sustained the demurrer on that ground.

This is plainly an action “for relief upon the ground of fraud,” within the terms of sec. 159, subd. 4. The complaint shows that the defendants intended to and did turn the Washington Company over to the Nevada Company, and that thus the Nevada Company was by the defendants given access to the Washington Company’s money and property; that the defendants at that time knew the Nevada Company to be grossly insolvent; that the natural and probable result followed—the Washington Company was robbed—its assets were converted by the Nevada Company; that the transaction was carried out by means of a “sale” of stock,—unlawful and known to the defendants to be unlawful because intended to violate, and actually violating the Sherman Law,—null and void and known to the defendants to be null and void because forbidden (a) by the general rule of common law prohibiting one bank from buying the stock of another, and (b) by the express prohibition in the charter of the Nevada Company; that the scheme was further carried out and designedly protected and screened from detection by a pretended consolidation, unlawful because not permitted by the charters of the companies involved, and really not attempted in good faith to be effected, though pretended to the public and to the banks’ customers to be effected; that the scheme and its successful accomplishment were further designedly protected and screened from detection by

a fraudulent change of name of the Nevada Company, made at the very moment of the "consolidation," by which it ceased to use the name "Fairbanks Banking Company" and took the name of the Washington Company, "Washington-Alaska Bank." All of these facts taken together proclaim in trumpet tones that this action is "for relief upon the ground of fraud," and bring it within the spirit and very letter of section 159, subdivision 4.

This case, therefore, comes within sec. 159, subd. 4, for the same reason and in the same way that *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165, came within it. In that case it was held that where an agent converted money properly belonging to his principal and resorted to subterfuges to conceal that fact, the action of the plaintiff was properly in damages for the fraudulent conversion and fell within said section and subdivision.

In *Pondir v. New York L. E. & W. R. Co.*, 72 Hun. 384, 389, 25 N. Y. Supp. 560, 562, the Court said of a transaction by which one corporation, owning nearly all the stock of another corporation, took a lease for 499 years on the latter's property, paying therefor only taxes and interest on the latter's debts:

"This was effected through the compliant board of directors of the Buffalo, Bradford and Pittsburgh Railroad Company, elected and controlled by the Erie Railway Company, which held a majority of the stock of the Buffalo, Bradford and Pittsburgh Railroad Company. By this means the last-mentioned corporation was stripped of all of its property * * * and for the use of which nothing will be paid for

499 years, except taxes assessed on its property and the interest on its debt. This renders all of the shares not held by the Erie Railway Company practically valueless, and that such was the intended effect is apparent from the transactions. *This was a fraud on the Buffalo, Bradford and Pittsburgh Railroad Company * * *.*"

It is clear from statements made by the Lords Justice in the case of *Metropolitan Bank v. Heiron*, 5 Exch. Div. 319, that, in their opinion, the statute would not run against a corporation in favor of a director if the other directors, who knew of the transaction, participated in or winked at the fraud. There the liquidator of the company sued one of the directors for 250 pounds sterling received by him from a debtor of the company as a bribe for using his influence with the board to permit the debtor to compromise the debt at a very low figure. But the other directors at a regular board meeting had been fully apprised of the whole matter by the debtor and had evidently disbelieved the story, for they took no action. At least, it was not charged that the other directors were implicated in the fraud. Lord Justice James said:

"I think, therefore, that the statute of limitations in this case began to run from the time at which the company discovered the fact, and the company must be held to have discovered the fact at the time when the person who is said to have paid the bribe went to the board of directors and told them the circumstances of the case. The fact that the directors investigated it and came to the conclusion that it was not true, does not at all help the company, unless they *allege and prove that the directors became*

accomplices in the fraud and added to the original fraud by a gross neglect of duty on their part. There is no suggestion of that kind.”

And Lord Justice Cotton, speaking of the innocent directors and of the charge made by the debtor against the bribed director, said:

“There is no suggestion that they, *for any purpose of their own or in fraud of the company* abstained from investigating it.”

A case directly in point on the proposition that a cause of action arising out of a secret, underhand violation of the Sherman Act is “for relief upon the ground of fraud,” is *American Tobacco Co. v. People’s Tobacco Co.*, 504 Fed. 58. The only question involved on the writ of error was the statute of limitations. The American Tobacco Company, another company and an individual had conspired against the People’s Tobacco Company, in violation of the Sherman Law, and the latter company sued them under section 7 of that law. The Court said (pp. 60, 61):

“The contention here, on the part of the People’s Tobacco Company, as we understand it, is that the combination and conspiracy between the American Tobacco Company, Augustus Craft, and the Craft Tobacco Company was concealed by the latter companies, or, at least, that their business operations and their methods were of such character that they concealed themselves, and that such concealment would prevent the running of the statute.

* * *

“The view of the Court, as indicated by the charge, was that prescription did not begin to

run until the People's Tobacco Company knew, or ought to have known, of the agreement or arrangement called 'a combination or conspiracy' on the part of the other tobacco companies against it."

The Court then quotes with approval from *Bailey v. Glover*, 21 Wall. 342, and continues (p. 62):

"It must be borne in mind that the course of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, *and this conduct and this concealment must necessarily be considered as a fraud on the plaintiff*. The court, in its charge, evidently assumed that, if the jury had found that the plaintiff was not entitled to damages, it would be unnecessary for it to consider the question of prescription at all. Indeed, such is indicated in the charge itself. But if it found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found *such conduct on the part of the defendants as would amount to a fraud on the plaintiff*, and all it was then necessary for it to consider was when the plaintiff first ascertained *the facts which formed the basis for the charge of fraud*."

We deem this case of *American Tobacco Co. v. People's Tobacco Co.* an unimpeachable authority to the effect that the conduct of the defendants in the case at bar gave rise to "an action for relief upon the ground of fraud," within the meaning of the section and subdivision of the statute of limitations which we are now considering.

The term "conspiracy" is hard to define. The term "fraud" is hard to define. They are not identical or synonymous in all cases. Not all conspir-

acies, it may be, are frauds. But we respectfully submit that it is impossible to think of a conspiracy that is not a fraud where the following are the facts: Where two or more persons secretly conspire for the purpose of injuring “the business or property” of a third person, in pursuance of which conspiracy overt acts are committed in secret and devious ways, which overt acts actually do injure such third person. And that is this case, as alleged in the complaint herein.

G

The Action Being in Right of the Corporation No Discovery of the Facts by the Corporation’s Creditors Could, in Itself, Have Started the Statute Running.

It may be objected that the fraud might have been discovered by others than the corporation itself and that they might have started suit to bring about relief to the Washington Company. To that we answer: (1) That is exactly what did occur; (2) that if others had not so discovered the fraud the defendants could not object because they intended and tried, successfully until 1915, to mislead the depositors and creditors of the Washington Company, and the public generally, into believing that there *was* no Washington Company left to be rescued—that it had been consolidated with the Nevada Company (tr. pp. 38-42); and (3) that it is immaterial, so far as the right of action of the Washington Company against these defendants is concerned, whether the Washington Company’s *creditors* discovered the fraud of the defendants or not, because this is not

a suit in right of the creditors, but of the corporation alone, and the discovery by the creditors of the right of action, while most fortunate for the corporation and the creditors themselves, neither started nor could start the statute running. It was not till a *representative* of the corporation had knowledge or notice of the facts that the statute could begin to run, for not till then was knowledge or notice brought home to the corporation. For the reasons heretofore dwelt upon, the knowledge of the defendants was not the knowledge or notice of the Washington Company. The creditors are not representatives of the corporation. The receiver is. Therefore, not till there was a receiver of the Washington Company, himself having such knowledge or notice, was such knowledge or notice brought home to the corporation.

How could the appointment of a receiver be brought about? By the defendants? Vain hope! By their co-conspirators? Equally vain. By action of the domiciliary State, Washington? It had no practical interest in a corporation which, though organized under its laws, never did business within its boundaries, but operated exclusively two thousand miles distant, and moreover the State had and could have no knowledge upon which to act. There was but one hope; namely, that some creditor of the Washington Company would discover the fact that said company was never consolidated with the Nevada Company, and, therefore, still persisted as a corporation with assets to be administered. If

such administration could be had the causes of action belonging to the company could be enforced. But, as the complaint charges, the defendants had deliberately misled the creditors. That was part and parcel of the defendants' scheme. Otherwise they might have been tripped up in carrying out their plans. So it was only by an accident, by some fortuitous occurrence, that the discovery by a creditor could be made. The complaint sets out how that came about. It is set out, with other facts, for the purpose of showing how it happened that a representative *was* finally appointed who had knowledge or notice "of the facts constituting the fraud,"—how the discovery of those facts was finally made on behalf of the corporation. Dilatoriness by the creditors, after learning the real situation, would not have affected the corporation or its right of action in any way, since this action is wholly in right of the corporation. But were the law otherwise, the complaint shows vigorous action by creditors the instant they learned the situation.

Therefore, on this point we adopt the position of counsel for the defendants, taken by them in the lower Court, for we say, with them, that the knowledge of any creditor is immaterial. We say further that the only question which is material is, When was the corporation or some one representing it first able to bring this suit? And the answer obviously is, Not till there came into being some person or functionary, apart from the defendants, to represent the corporation. In the circumstances of this cor-

poration that is equivalent to saying, Not till a receiver was appointed for it. And as Mr. Noyes, at the time of his appointment, though obtained only shortly prior thereto (tr. p. 41), had knowledge of the conspiracy and all the hitherto concealed and undiscovered facts relating thereto, his personal knowledge became on the instant of his appointment the knowledge of the receiver of the Washington Company, and from that date, and that only, the statute began to run.

H

Fraud Which Conceals Itself Prevents the Running of the Statute of Limitations Just as Effectually as Fraud Which the Defendant Actively Conceals.

We have demonstrated, we think, in connection with topics previously discussed, that, the defendants having acted in their own interest and adversely to the corporation and the corporation therefore having had no one through whom it could have or receive knowledge or notice, the corporation could not and did not have such knowledge or notice till a receiver for it was appointed in 1915. We have also shown that the conduct of the defendants, as alleged in the complaint, was, under the authorities, a fraud. Therefore, in the nature of things, the said fraud remained concealed from the corporation till said receiver was appointed. But more than that, the complaint distinctly alleges, as already stated herein, that the defendants purposely screened the real nature of their acts by clothing them in the forms of law—a sale, a consolidation, etc.—for the

very purpose of preventing detection by the only persons by or through whom, in the circumstances, relief for the corporation could possibly be initiated. Therefore the complaint makes out a case not only of fraud, the nature of which concealed it, but also of fraud designedly concealed from the creditors, through whom alone relief was, as a practical fact, to be expected.

The authorities, both in numbers and respectability, are overwhelming, that fraud which conceals itself prevents the running of statutes of limitation, both in equity cases and in actions at law, no less than that fraud which the defendant actively concealed. The statute does not run until the fraud is discovered.

Bailey v. Glover, 21 Wall. 342, 347-349;

Martin v. Smith, Fed. Cas. No. 9,164;

Carr v. Hilton, Fed. Cas. No. 2,436;

Bartles v. Gibson, 17 Fed. 293, 299;

Cook v. Sherman, 20 Fed. 167, 171, 172;

Duff v. First Nat'l. Bank, 13 Fed. 65;

Snodgrass v. Bank of Decatur, 25 Ala. 161;

First Mass. Turnpike Co. v. Field, 3 Mass. 201;

McMullen v. Winfield Bldg. & Loan Ass'n.,
64 Kan. 298, 67 Pac. 892, 894;

Moore v. Waco Bldg. Ass'n., 19 Tex. Civ. App.
68, 45 S. W. 974;

Booth v. Lord Warrington, 4 Brown's Parliamentary Cases 163;

Rolfe v. Gregory, 4 DeGex, J. & S. 576;

South Sea Co. v. Wymondsell, 3 Peer Williams 143;

Hovenden v. Lord Annesley, 2 Schoales & Lefroy 634;

2 Pomeroy's Eq. Jur., §917, note 2;

Story, Eq. Jur., §1521;

Kerr, Fraud & Mistakes (4th ed.), p. 346.

And see:

Northwestern Lumber Co. v. Aberdeen, 35 Wash. 636, 639, 77 Pac. 1063;

New York etc. Co. v. Tacoma, 30 Wash. 661, 71 Pac. 194;

Bidwell v. Tacoma, 26 Wash. 518, 67 Pac. 259;

Potter v. New Whatcom, 20 Wash. 589, 56 Pac. 394.

In *Bailey v. Glover*, 21 Wall. 342, 347-349, the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

“In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

“We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part*, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of

the party committing the fraud to conceal it from the knowledge of the other party.

“* * * we are of opinion * * * that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule *to suits at law* as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent fraud. * * * To hold that by concealing a fraud, or by committing a fraud, in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried *on the common law side* of the court’s calendar as to those on the equity side.

“* * * we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.”

Pomeroy, says (§917, note 2):

“It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean that the defrauded party must *necessarily* have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence; nor that the fraudulent party must *necessarily* have used some affirma-

tive means to cover up his acts; nor that any *special* duty, such as a trust or fiduciary relation, must rest upon the fraudulent party, different from that which rests upon all such wrong-doers to speak the truth. It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based." (Italics are author's.)

I

Matter of Foreign Law Is Matter of Fact

Since it was only through the creditors that relief could be set on foot, it is to be observed that they were not only *actually* deceived, as the complaint alleges, by the representations made by the defendants, but also that the information which would have undeceived the creditors naturally concealed itself. That information was matter of foreign law—the laws of Nevada which would have made it clear that there could have been no consolidation. We say it naturally concealed itself, for surely it is not reasonable to expect that depositors or creditors of the Washington Company should look up the laws of the Nevada Company's domicile, a foreign state, to find out what the latter company's powers were. Assuming, for the sake of the argument, that the depositors were charged with notice of the powers of the Washington Company so far as related to their

transactions with it, to-wit, doing their banking with it, they were not chargeable with notice of the powers of the Nevada Company. It would be most unnatural of them to look up the laws of Nevada. It is not to be exacted or even expected of them. Those laws were matters which would naturally remain unknown to them, and therefore the Court would not hold them chargeable with notice thereof. So far as they bore upon the creditors' rights against the Washington Company, those laws were *facts* which naturally concealed themselves. The central question which affected the creditors' rights was whether or not the Washington Company had been consolidated with the Nevada Company. If it had been, the administration under the Nevada Company's receiver was conserving and protecting the rights of those who had been creditors of the Washington Company. If there had been no consolidation, the rights of the Washington Company's creditors were not being protected. Whether there had been such consolidation depended upon (a) the existence of laws in the domiciliary States of the corporations, Washington and Nevada, authorizing such consolidation, and (b) proceedings by the corporations and their stockholders in conformity with such laws. The defendants represented to the creditors of the Washington Company, both by conduct and by declarations, that there were such laws and that such proceedings had been had. In the nature of things, one of these matters being the private proceedings of the defendants themselves and their co-

conspirators, and the other being a matter of fact which said creditors could not be charged with knowing, the creditors could not know the untruthfulness of the representations. The creditors were residents of Alaska and all of their business transactions with the Washington Company occurred there. To them Washington and Nevada were foreign States.

The lower Court seems to have thought that as regards the creditors of the Washington Company the matters of Nevada law and Washington law were matters of law, not of fact, for it said (tr. p. 71):

“The allegations of the complaint to avoid the bar are not the want of knowledge of the facts but rather want of legal information upon the facts. * * * In fact, the complaint sets out the transactions at hand, all of which appear to have been in the possession of the plaintiff more than three years prior to the commencement of this action, but seeks to toll the statute because he was not advised of the legal status of the known facts.”

Disregarding the obvious error already referred to hereinbefore, viz., of assuming that the knowledge of Mr. Noyes in his private capacity or as receiver of the Nevada Company could be imputed to the Washington Company, before he was appointed receiver of the latter company, we confine our attention to the error which the Court commits of considering matters of foreign law to be matters of law, not of fact. It is too well established to be ques-

tioned at this late day that matters of foreign law are matters of fact.

Haven v. Foster, 9 Pick. (Mass.) 112, 129, 19

Am. Dec. 353, 359;

Bank of Chillicothe v. Dodge, 8 Barb. (N. Y.)

233;

Ellison v. Branstrator, 153 Ind. 146, 54 N. E.

433;

Norton v. Marden, 3 Shepley (Me.) 45;

Patterson v. Bloomer, 35 Conn. 57, 95 Am.

Dec. 218;

Leslie v. Baillie, 2 Younge & C. Ch. 91;

McCormick v. Garnett, 5 DeGex, M. & G. 278;

2 Pomeroy's Eq. Jur., §839;

1 Story, Eq. Jur. (10th ed.), §140.

And see:

Merchants' Bank v. Spalding, 12 Barb. (N.

Y.) 302; Affd. 9 N. Y. 53;

California Civil Code, §1579;

New York Civil Code, §764.

The case of *Haven v. Foster*, *supra*, is one of the clearest on this subject. An intestate, resident in Massachusetts, died leaving certain property in New York. He had four relatives living in Massachusetts. If the property were distributed according to the laws of Massachusetts each of those relatives was entitled to one-quarter, but if according to the laws of New York, of which they were all ignorant, one of the four was entitled to one-half and the other three to one-sixth each. The property was distrib-

uted according to the laws of *Massachusetts*. Thereafter the one entitled to one-fourth learned of the provision of the New York law and sued one of the other distributees for the recovery of the difference between one-quarter and one-sixth. The Court said (9 Pick. 129) :

“The principal objection to the plaintiff’s recovery, and the one most relied upon by the defendant’s counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.

“It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim: *Ignorantia juris quod quisque tenetur scire, neminem excusat*.

* * *

“The misapprehension or ignorance of the parties to this suit, related to a statute of the State of New York. Is this, in the present question, to be considered *fact* or *law*?

“The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. * * * If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. * * * The laws of other states in the Union are in these respects foreign laws. * * * The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. * * *

“That the *lex loci rei sitae* must govern the descent of real estate, is a principle of our law, with which every one is presumed to be ac-

quainted. But what the *lex loci* is, the Court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the Court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other states.

“We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a *fact*.”

In *Bank of Chillicothe v. Dodge*, the Court said (8 Barb. 233):

“Ignorance of the law of a foreign government is ignorance of fact—and in this respect the statute laws of other states of this Union are foreign laws.”

And it is also well settled that to be ignorant or remain ignorant of foreign law is not negligence, no matter how long that ignorance continues. In *Haven v. Foster*, quoted from above, the Court used this language (9 Pick. 128):

“It is in the first place objected, that the plaintiff’s ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be

presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve. In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. *But this doctrine does not apply to the present case.* It was not the duty of the plaintiff to know the laws of New York, *nor does ignorance of them imply negligence."*

But, as we have already stated, this action being in right of the Washington Company, not in right of its creditors, the vital question is not whether or when the creditors acquired notice or knowledge of the fraud, *but when the corporation acquired such notice or knowledge*, and in the nature of things that could not be till a receiver was appointed for it.

SUMMARY

The statute of limitations did not run against this cause of action until Mr. Noyes was appointed receiver in the State of Washington in 1915 because: (1) Mr. Noyes as receiver of the Nevada Company was not receiver of the Washington Company, and his knowledge as receiver of the Nevada Company did not in any way affect or bind the Washington Company as to this or any other cause of action by or in behalf of the Washington Company; (2) all of the defendants, being all of the stockholders, directors and officers of the Washington Company, joined in the conspiracy, and thus the Washington Company was left without any one by or through

whom it could have knowledge or notice of the conspiracy, and so long as that condition continued, that is, until the corporation could acquire such knowledge or notice, or some one in its behalf could acquire it, the statute did not run; (3) the conduct of the defendants and their fellow-conspirators amounted to prevention of suit by a superior power, and as long as such prevention continued the statute did not run; (4) that prevention having been by the defendants themselves, the principle of estoppel prohibits them from asserting that time ran against the corporation while the prevention continued; (5) the whole transaction of September, 1909, and later, was a fraud on the Washington Company, and that fraud was, until 1915, concealed by its very nature and by the very circumstances of the case from the Washington Company, in which alone the right of action existed; and the appointment of the receiver in the latter year affected the Washington Company, for the first time, with knowledge of the fraud; but if the right of action had been in the creditors of the Washington Company (as it was not), the fraud was concealed from them not only by its very nature but by the active and affirmative misrepresentations of the defendants and their co-conspirators, so that negligence cannot be imputed to them for failing to discover the fraud prior to 1915. Till 1915 there was no one who could sue. Till 1915 the fraud was not discovered.

We respectfully submit, therefore, that the Dis-

trict Court erred in sustaining the demurrer and in dismissing the action. The complaint states a cause of action against the defendants, and the action was commenced within time.

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ORIGINAL

No. 2838

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington,
Plaintiff in Error,
vs.

W. H. PARSONS and JANE DOE PARSONS, his wife; FALCON JOSLIN and JANE DOE JOSLIN, his wife; JOHN SCHRAM and JANE DOE SCHRAM, his wife; E. L. WEBSTER and JANE DOE WEBSTER, his wife; J. W. CLISE and JANE DOE CLISE, his wife; F. E. BARBOUR and JANE DOE BARBOUR, his wife, and WASHINGTON SECURITIES COMPANY, a corporation,
Defendants in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief of Defendants in Error

CLISE & POE and
PETERS & POWELL,
Attorneys for Defendants in Error.

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Defendants in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief of Defendants in Error

This is an action at law brought by the plaintiff, appellant here, as receiver of the Washington-Alaska Bank, a corporation of the State of Washington, against all of its stockholders (who include all its officers and trustees) to recover damages

under section seven of the act of Congress known as the "Sherman act." It is alleged that the bank suffered these damages by reason of its having entered into a conspiracy with certain other banks in Fairbanks, Alaska, where it was doing business. These other banks were First National Bank of Fairbanks and the Fairbanks Banking Company, the latter being originally a partnership and afterwards incorporated under the laws of Nevada.

It is further alleged that the plaintiff's bank, i.e., the Washington bank, became a party to this conspiracy, by the concerted action of all its stockholders. It is claimed by the plaintiff that the Washington bank, having suffered damage by this conspiracy, to which it was a party through the action of all its stockholders, has a right of action against its stockholders for such damage, and that the plaintiff, as its receiver, has succeeded to that right of action. The defendants demurred to the complaint and the district court sustained the demurrer on the grounds that (a) the complaint did not state a cause of action; and (b) the action was not brought within the time limited by law. This appeal is from the judgment of the district court sustaining the demurrer and dismissing the action.

The essential allegations of the complaint, briefly summarized, are as follows:

THE COMPLAINT.

(We shall call, for the sake of brevity, the Washington-Alaska Bank, of which the plaintiff is the receiver, the "Washington Bank," the First National Bank of Fairbanks, the "First National," and the Fairbanks Banking Company, the "Nevada Bank.")

That the Washington Bank was organized under the laws of the State of Washington and entered upon the business of banking at Fairbanks in the year 1905. The First National and a copartnership composed of Barnett, Hill and Wood, known as the Fairbanks Banking Company, were also there engaged in the banking business. Subsequently, in 1908, the above copartnership, was incorporated under the laws of Nevada (Pars. 1, 2, 3, 4, 5, 6 of the Complaint; Trans. pp. 3, 4, 5).

That the defendants, exclusive of the women, are the stockholders and officers of the Washington Bank. That the above banks were all the banks doing business at Fairbanks, or in that vicinity, which is a mining country, and they bought unrefined bullion, loaned money, sold exchange and carried on the usual banking business in a mining country (Pars. 7, 8, 9; Trans. pp. 5, 6, 7).

That in the year 1905 the said three banks “agreed, combined and conspired together to restrain trade and commerce” by conducting their business non-competitively, and in order to effect and secure such non-competitive conduct entered into a certain agreement in writing which is set out in the complaint in full. This agreement bears date June 6, 1905, and fixes the price to be charged for exchange, telegraphic transfers, handling of gold dust, collections, rates of interest, etc. (Par. 10; Trans. pp. 9, 10, 11, 12.)

“That the agreement, combination and conspiracy aforesaid, entered into on the date set forth in said written agreement, was continued up to and including January 4, 1911.” In the meantime the banks, parties to the agreement, carried on a large business pursuant to that agreement, and charged and enforced unreasonable, high and excessive charges and rates. (Par. 11; Trans. pp. 12, 13).

That, in order to secure the observance of the above unlawful agreement, each of the parties thereto deposited with the clerk of the district court of the Territory of Alaska the sum of five thousand dollars as the penalty to be forfeited in case of violation. Nevertheless, the directors, officers and stockholders of the Washington Company and the Nevada Company suspected that the First National was secretly violating the agreement and there-

upon, on May 7, 1909, the Nevada Company purchased half of the capital stock of the First National and the Washington Company purchased the other half, in order "to carry out and effectuate the purposes of said unlawful agreement, combination and conspiracy." The Washington Bank and the Nevada Bank each paid \$62,500.00 for one-half of the First National stock. Thereupon, the Nevada Company and the stockholders and officers of the Washington Company, "in pursuance of the combination and conspiracy hereinbefore mentioned," compelled it to enter into a further agreement in writing with them of the same general nature as the agreement of June 6, 1905 (Pars. 11, 12, 13; Trans. pp. 12, 13, 14, 15, 16, 17, 18, 19, 20).

That on May 10, 1909, "in pursuance of the conspiracy as hereinbefore set forth," the Washington-Alaska Bank and the Fairbanks Banking Company entered into another illegal agreement in writing, which is set out in full and is supplemental to the agreement last above mentioned of the same date (Par. 14; Trans. pp. 22, 23, 24).

That thereafter, while the directors, stockholders and officers of the Washington Bank and the Nevada Bank were conducting and carrying on the banking business "in pursuance of said unlawful

combination and conspiracy in restraint of trade and commerce," they agreed, "in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce," that the stockholders of the Washington Company should sell to the Nevada Company all the capital stock of the former and all the assets; and that "in pursuance of said combination and restraint of trade and commerce," it was agreed that the Nevada Company should purchase from these defendants, for the sum of \$250,000.00, all of the stock of the Washington Bank (Par. 15; Trans. pp. 24, 25, 26), and this sale and transfer was consummated about the 16th of September, 1909 (Par. 16; Trans. pp. 27, 28, 29).

That thereupon the directors of said Washington Company, "in pursuance of said unlawful agreement, combination and conspiracy in restraint of trade and commerce," entered into an agreement in writing with the Nevada Company whereby, in consideration of the purchase by the latter of said shares, the sellers agreed not to engage in the banking business in the vicinity of Fairbanks for a period of five years (Par. 17; Trans. p. 33).

That at the time of the purchase by the Nevada Bank of the shares of the Washington Bank, the

Nevada Bank was insolvent, but the Washington Bank was solvent (Pars. 18, 19; Trans. pp. 33, 34).

That the real value of the shares of the Washington Bank was \$140,000.00, and the difference between this amount and the purchase price of \$250,000.00 was paid to the defendants as an advance of the future unlawful profits to be made by the Nevada Company "out of the unlawful agreement and combination in restraint of trade and commerce hereinbefore set forth." (Par. 19; Trans. pp. 34, 35).

"That in pursuance of said combination and conspiracy in restraint of trade and commerce," the directors and stockholders of the Washington Bank agreed with the Nevada Bank "to perfect and did perfect the said unlawful combination in restraint of trade and commerce" by causing the directors of the Washington Bank to resign in order that a new board should be selected by the Nevada Bank, which had purchased all the shares. This occurred in January, 1910. Thereafter, and until January 4, 1911, the affairs of the Washington Bank were continued by the new board so selected. On the first day of October, 1910, the Nevada Bank, which then owned and controlled all of the stock of the Washington Bank, took over all the assets of the Washington Bank and thereby consolidated the two institutions, although it is alleged that such consolidation was illegal. "That the said Nevada Company, in pursuance of said unlawful conspiracy and combination in restraint of trade and commerce, hereinbefore set forth, so conducted and operated said Washington Company during all of said times from

September, 1909, until January 4, 1911, in such manner that it dissipated, wasted and converted all the assets of the Washington Bank, leaving its debts unpaid." (Par. 20; Trans. pp. 33, 36.)

That the officers and directors of the Nevada Bank, and the new officers of the Washington Bank (not these defendants) pretended to consolidate the two banks, and there was an actual physical comingling of the assets, and the business was continued as one consolidated or merged corporation, and it was so held out and represented to the creditors and depositors of both banks and to the public generally. That the consolidation was unlawful; that after the consolidation the Nevada Bank, which had taken over the assets of the Washington Bank, changed its name to Washington-Alaska Bank for the purposes of deception. That from September 16, 1909, the Washington Bank and all its assets were absolutely controlled by the Nevada Bank (Par. 21; Trans. p. 37).

That the Nevada Bank continued to carry on the consolidated business until January 4, 1911, when receivers were appointed for it on the ground of insolvency. That the receivers first appointed resigned and this plaintiff was appointed by the district court of Fairbanks, Alaska, receiver of the Nevada Bank, and, as such receiver, took possession of its assets (Par. 22; Trans. p. 38).

That the creditors and depositors and the receiver did not know that the sale of the shares of stock of the Washington Bank was fraudulent nor that the consolidation was fraudulent and void, and the receiver of the Nevada Bank proceeded to administer upon all its assets, including the assets which it had received from the Washington Bank upon the pretended consolidation; that at no time prior to March, 1915, did any creditor, depositor or other person interested in the administration of the assets of the Washington Bank have any notice or knowledge of the existence "of said combination and conspiracy in restraint of trade and commerce as aforesaid." That the plaintiff was appointed in May, 1915, by the Alaska court as receiver of the Washington Bank and has since been appointed receiver thereof by the Superior Court of King County, Washington (Pars. 23, 24; Trans. pp. 40, 41, 42, 43, 44, 45).

That the Washington Bank has unpaid debts in excess of \$500,000.00, and no assets. The damages which the Washington Bank has suffered are alleged to be: (a) One hundred ten thousand dollars, being the value of its assets over and above its liabilities at the time the defendant sold their shares of stock; (b) five thousand dollars for the loss of

the use of \$62,500.00, which it paid through the instrumentality of the defendants for one-half of the capital stock of the First National; (c) five hundred twelve thousand five hundred fifty-seven and 17/100 dollars, being the amount necessary to pay its debts.

ARGUMENT.

A.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

1. It must be constantly borne in mind that this action is brought under Section seven of the Act of Congress of July 2, 1890, commonly known as the "Sherman Act." That section is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It is conceded that the action is brought under this section. It will be observed also that the jurisdiction of the federal court does not exist unless the damages sued for are shown to have been suffered by a violation of that act. It is not sufficient for the plaintiff to show that he has *a* cause of action which he might maintain in some other forum or in some other form of action. In order to enable the plaintiff to obtain redress in the federal court he must show that his injury has been sustained by reason of the violation of the Sherman act.

Corey vs. Independent Ice Co., 207 Fed. 459.

It is not sufficient, therefore, for the plaintiff to show, if indeed he has, that he has the right, as the receiver of the Washington Bank, in the right of its creditors, to pursue the assets of the Washington Bank which may have been disposed of by its officers and directors in fraud of its creditors or to charge them with the value of the assets dissipated in fraud of creditors.

It might be conceded that the plaintiff would have the right, since the Washington Bank is a Washington corporation, under Section 3697 of Remington & Ballinger's Code of Washington, to sue the trustees for the value of assets disposed of by them.

Tait vs. Pigott, 32 Wash. 344.

Brenman vs. Whitehouse, 85 Wash. 355.

Nor is it sufficient for the plaintiff to show, if indeed he has, that the defendants, notwithstanding the fact of the fully executed sale of their shares of stock to the Nevada Bank, are still the owners of such shares because of the illegality of such sale, and liable upon their superadded liability, under Section 3698 of Remington & Ballinger's Code of Washington, which imposes upon the owners of the shares of stock in banks organized under the laws of the State of Washington substantially the same superadded liability as rests upon shareholders in national banks.

It might be that, under the facts stated in the complaint, the plaintiff could maintain a bill in equity against these defendants and all other persons who were parties to the dissipation of the corporate assets upon the familiar principle that permits a receiver of an insolvent corporation to assert the rights of creditors to pursue the corporate assets which have been disposed of in fraud of their rights and to charge the perpetrators of the fraud with the value of such assets in case they have been dissipated.

But a state of facts which shows the existence of any or all of the above rights and remedies is wholly insufficient to sustain the present action. And, unless this is constantly borne in mind, the discussion wanders from the precise question before the court.

2. This is not a suit to recover damages suffered by stockholders. Nor is it a suit to recover damages suffered by creditors to *their* "business or property." It is an action brought by the receiver in the right of the corporation itself to recover damages by reason of a tort which it is claimed *it* suffered in *its* "business or property." This is conceded by the appellant, whose argument proceeds upon this theory. (See appellant's brief, pp. 10, 20, 59, 61, 125, 127, 138.)

On page 44 of appellant's brief it is stated that "the question lies between the two parties only—the corporation on the one hand and the stockholders on the other." And on page 72 of appellant's brief it is stated: that, "the question is narrowed down so as to lie between the Washington Company and its own stockholders and directors." And by "stockholders," it is conceded, is meant the whole

body of its stockholders. We agree with the appellant on this point. This is correct, for it is clear that no right of action in tort for injury to the "business or property" of the corporation under section seven of the Sherman act exists in the receiver unless it exists in the corporation itself. The mere appointment of the receiver does not create a tort or a right of action where none previously existed. It only vests in the receiver the rights of action which the corporation had. If a cause of action now exists in the receiver it would have existed in the corporation if no receiver had been appointed.

We are not now concerned with the question whether creditors of a corporation injured in its business or property have an action in their own right, under section seven of the Sherman act, which a receiver of such corporation may assert in their behalf. No such claim is made in this case. We shall advert to this question again hereafter.

3. Nor is this an action for damages suffered by the plaintiff's corporation by reason of a conspiracy entered into by third parties and ^{to} which it was not a party.

It was itself a party to the alleged unlawful conspiracy by which the plaintiff claims it was injured in its property or business. The pleader, when drafting the complaint, fully appreciated the fact that, in order to state a cause of action under section seven of the Sherman act, he must show, not only damages, but that the damages were suffered by reason of a contract, combination, or conspiracy in restraint of trade or commerce. The complaint alleges with great particularity what this "contract, combination and conspiracy" was. And the pleader takes great care to show that there was but one conspiracy and that all of the acts complained of were but steps in this one continuing combination and conspiracy.

It is now, for the first time, claimed by the appellant that there are three several conspiracies charged in the complaint, and that the plaintiff's corporation was indeed a party to the first two of these conspiracies but not to the third, which was independent of the two first. We are constrained to insist that the complaint be taken as we find it drawn by the pleader, and not as edited by the briefer to meet the present exigency.

It is claimed by appellant that the first 14 paragraphs of the complaint contain nothing but formal

allegations and matters of inducement. Aside from the fact that this is rather a liberal allowance for inducement in a law action, an examination of the complaint shows that if the first 14 paragraphs of the complaint be so treated there will be left no showing whatever of a combination or conspiracy in restraint of trade.

The combination and conspiracy as shown by paragraph X of the complaint was entered into by the First National, Washington Bank, and the Nevada Bank through their respective officers and stockholders in the year 1905. (Trans. p. 8.) It is there alleged that the parties "secretly, unlawfully, and in violation of section three of the act of Congress of July 2, 1890, commonly known and called the 'Sherman Anti-Trust Act,' agreed, combined and conspired together to restrain trade and commerce in the territory of Alaska and between said territory and the several states of the Union and between said territory and foreign nations in this, to-wit: the board of directors, managers and officers of the said three banks then and there secretly agreed together and with one another to conduct their said three several banking businesses non-competitively, and in order to effect and secure such non-competitive conduct thereof, the board of

directors of each of said three banks, by its managing officers, then and there entered into an agreement in the words and figures following, to-wit.” And then follows in *haec verba* a written contract between the three banks fixing the charges for exchange, for telegraphic transfers, for handling gold dust, collection charges, interest on loans, etc. (Trans. p. 9.)

Immediately thereafter in paragraph XI of the complaint, (Trans. p. 12) it is alleged “*that the agreement, combination and conspiracy aforesaid entered into on the date set forth in said written agreement was continued up to and including January 4, 1911.*” (The italics are ours.) And further “that during all of said time the said schedule of rates and charges set forth in said agreement was unreasonably high and grossly excessive but was notwithstanding substantially observed and enforced by said directors of the said three banks and each of them.” It is further alleged that *during all said times* business amounting to many millions of dollars was done “in pursuance of and in compliance with the said agreement to charge, observe and enforce unreasonably high and grossly excessive charges and rates.” This is the original and only conspiracy.

It is conceded by the appellant that the Washington Bank was a party to this alleged conspiracy. It is specifically pleaded in the language above quoted from paragraph XI of the complaint that this conspiracy continued up to January 4, 1911, and that the parties thereto operated thereunder up to that time. Now, January 4, 1911, is the date upon which the Nevada Bank went into the hands of a receiver and was long after the Nevada Bank had absorbed all of the assets of the Washington Bank in the manner that the plaintiff complains of. How now can it be claimed that the conspiracy alleged in paragraphs X and XI is but matter of inducement? Moreover, every subsequent step pleaded in the complaint is with great care alleged to be but a step taken in the carrying out of this conspiracy.

In paragraph XIII of the complaint (Trans. p. 14) it is alleged that the Nevada Company and the Washington Company became suspicious that the First National was not abiding by the agreement "and to prevent such variation therefrom and to carry out and effectuate the purposes of said unlawful agreement, combination and conspiracy" bought all the shares of the capital stock of the First National; and that "in pursuance of the combination and conspiracy hereinbefore mentioned"

compelled it to enter into a further agreement in writing which is set out in full. This agreement bears date the 10th day of May, 1909. (Trans. p. 14-20.) In paragraph XIV of the complaint it is alleged that on the same day, i. e., May 10, 1909, that the officers, stockholders and directors of the Washington Bank and the Nevada Bank “did secretly and in pursuance of the conspiracy as hereinbefore set forth further conspire together and entered into an illegal agreement,” and the agreement is set out in full.

It is conceded that the Washington Bank was a party to these two last agreements which, as we have shown above, are alleged to have been but parts of the original conspiracy of 1905, which still persisted until 1911.

This brings us to paragraph XV where plaintiff claims is pleaded a wholly independent conspiracy to which the Washington Bank was in no manner a party.

This independent conspiracy, it is claimed, consisted of the sale by the defendants of all of the shares of stock of the Washington Company, to the Nevada Company, and the absorption by the Nevada Company of all the assets of the Washington Company and the subsequent loss thereof.

The pleader well understood that it was essential to connect this transaction with the original conspiracy in restraint of trade in order to show a cause of action under the Sherman act. Consequently it is alleged in paragraph XV “that, while the directors, stockholders and officers of the said Washington Company, defendants herein, and the said Nevada Company, were conducting and carrying on a banking business in pursuance of the said unlawful combination and conspiracy in restraint of trade and commerce” they agreed together, on or about September 13, 1909, “*in order to make still more secure and to render permanent the said unlawful restraint of trade and commerce*, that the stockholders and directors of said Washington Company should sell to the Nevada Company all of the capital stock and all of the assets of the said Washington Company, and that said Nevada Company should purchase from the stockholders and directors of the said Washington Company all said capital stock and assets, and that the said directors, stockholders and officers of said Washington Company should compel the said Washington Company to deliver to the Nevada Company their trust and offices as directors and all the moneys, property and assets, whatsoever of the said Washington Com-

pany;" and "that, in pursuance of said combination and conspiracy in restraint of trade and commerce," the agreement for the sale and purchase of said shares and stock was made and consummated. (Trans. pp. 24, 25, 26, 27, 28. The italics are ours.) Here is a direct, specific and unequivocal allegation that the very things which the plaintiff now claims are of the gist of his action were done while the original conspiracy was still in force to which the Washington Bank was admittedly a party and in order to secure and perpetuate that conspiracy and in pursuance of it.

In paragraph XVII of the complaint it is alleged that "in pursuance of the said unlawful agreement, combination and conspiracy in restraint of trade and commerce, the directors of the Washington Company entered into an agreement in writing with the Nevada Company whereby, in consideration of the purchase by the Nevada Company of their shares of stock they agreed to refrain from engaging in the banking business in the vicinity of Fairbanks for the period of five years. (Trans. pp. 29, 30, 31, 32.) (This agreement of the seller not to compete with the buyer is unquestionably valid. *U. S. vs. Addyston Pipe Co.*, 85 Fed. 281.)

In paragraph XIX of the complaint it is alleged that part of the consideration received by the defendants for their stock was an advance of the future unlawful profits to be made “out of the unlawful agreement and combination in restraint of trade and commerce hereinbefore set forth.” (Trans. pp. 34, 35.)

In paragraph XX of the complaint it is alleged “*that in pursuance of said combination and conspiracy in restraint of trade and commerce and said pretended sale and purchase * * * the directors and stockholders of said Washington Company agreed with the Nevada Company to perfect and did perfect the said unlawful combination and conspiracy in restraint of trade and commerce by causing the directors of said Washington Company to surrender, by instrument in writing, their offices as directors of the said Washington Company to a board of directors designated, selected and controlled by said Nevada Company.*” That “in pursuance of said policy *and of said unlawful agreement, combination and conspiracy* and as a result of the control of the Washington Company given and obtained as aforesaid said Nevada Company, with the knowledge and consent of the defendants herein, and each of them took from the said Wash-

ington Company all of its assets and dissipated, wasted and diverted the same.” (Trans. pp. 35, 36. *Italics are ours.*)

The pleader evidently was actuated by the desire to connect and tie every step in the series of transactions complained of to the original combination and conspiracy which was set forth in paragraph X of the complaint, and therein alleged to have continued and persisted until the end. Every step is with great care alleged to have been in pursuance of and a part of the original conspiracy.

This is further emphasized in paragraph XXIII of the complaint (Trans. p. 41) where the pleader is seeking to avoid the bar of the statute of limitations. It is therein alleged “that at no time prior to March, 1915, did any creditor, depositor or other person interested in the administration of the assets of the said Washington Company have any notice or knowledge of the existence of said combination and conspiracy to restrain trade and commerce as aforesaid.” If it is true that the complaint pleads three separate conspiracies, of which one of the three did the pleader hereby intend to deny knowledge?

We submit not only that the complaint shows but one conspiracy, and acts done in pursuance thereof, but that unless the complaint alleges that the acts and things complained of were done pursuant to the conspiracy alleged in paragraph X of the complaint, there is no allegation to show that the injuries complained of were suffered by reason of any violation of the Sherman act. For the complaint contains no allegations of a combination or conspiracy that in any degree tended to restrain trade or commerce, unless they can be found in paragraphs X to XIV of the complaint. To this conspiracy it is conceded that the Washington Bank, as a corporation, was itself a party.

4. The precise question, then, before the court is: Does the Washington Bank have a right of action in its own right for damages which it suffered by becoming a party to a contract in restraint of trade which it entered into by the active consent of all of its officers and all its stockholders?

The Washington Bank has no such cause of action for two reasons:

(a.) It was itself a party to the alleged illegal

conspiracy and it was in the carrying out of this conspiracy that the injuries complained of were sustained.

Bishop vs. Am. Preserving Co., 105 Fed. 845.

We have pointed out above that the transactions complained of, under the allegations of the complaint, were carried out in furtherance of the original conspiracy in restraint of trade, to which it is conceded the Washington Bank was itself a party. We have further pointed out that unless the transactions complained of were carried out in pursuance of such original conspiracy in restraint of trade, the damages were not suffered by anything forbidden or declared to be unlawful by the Sherman act, and there would therefore be no right of action under section seven of the Sherman act.

Notwithstanding the plain allegations of the complaint to the contrary, it is contended that the corporation itself was not a party because of some highly metaphysical distinction between the whole body of the stockholders and the corporation itself. The appellant's position on this question is, in brief, that when all of the officers and stockholders are carrying on the corporate business in a certain way that nevertheless the corporation itself is not carrying on its business in that way.

It is quite true that for many reasons of convenience the corporate entity is recognized as something distinct from its stockholders. It is equally true, however, that a corporation outside of and beyond the constituent body of its stockholders is nothing. The corporation is its stockholders working together in unison and for certain purposes by agreement among themselves expressed in its charter and by-laws. This union of its stockholders for definite purposes is the corporate entity. And the distinction between the united body itself and its constituent members is maintained for the purpose of carrying out the purposes of the corporation. And ordinarily the rights of the constituent members of the united body, i. e., the corporation, are worked out by preserving the distinction between the corporate entity and the shareholders because in this way only can the rights of the parties be readily measured and preserved.

Morawetz on Private Corporations, Sec. 227,
2d Ed.

But in the very nature of things the corporation can only act through its officers and stockholders. If they, including the whole body of the stockholders, in the management of the corporate business, act one way, there is no constituent element of the corporate entity left to act in another way.

The shareholders cannot by unanimous action make an unlawful act, lawful. Only the legislature can do that. But they can make it a corporate act.

Morawetz, Private Corporations, sec. 623.

It was most strenuously contended in the district court that the corporation itself was not a party to the illegal conspiracy, but that its stockholders only were parties to that conspiracy. This contention is fully answered by the following cases.

Linn and Lane Timber Co. vs. United States,
(9th Circuit) 116 C. C. A. 267, 196 Fed.
593;

State ex rel Watson vs. Standard Oil Co.,
49 Ohio St., 137, 30 N. E. 279, 34 Am. St.
Rep. 541, 15 L. R. A. 145.

*People of New York vs. North River Sugar
Refining Co.*, 121 N. Y. 582, 24 N. E. 834,
18 Am. St. Rep. 843, 9 L. R. A. 33.

The case of *State ex rel Watson vs. Standard Oil Co.*, *supra*, was a cause brought against the Standard Oil Company of Ohio charging it amongst other things with having entered into illegal combinations in restraint of trade. The combinations were effected through certain agreements between the whole body of the stockholders and the stockholders of other corporations. The case differed from the case at bar in this: that in the case at bar

the illegal agreements purported to be the agreements of the corporation. In the Ohio case care was taken to avoid making the corporation a party in name. Notwithstanding that fact, however, the Supreme Court of Ohio held that the corporation as such was a party to the illegal transaction. In other respects the essential facts so far as affecting the question here were the same; and the court said:

“The general proposition that a corporation is to be regarded as a legal entity existing separate and apart from the natural persons comprising it is not disputed, but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by anyone who pretends to accurate knowledge on the subject.”

And again:

“So that the idea that a corporation may be a separate entity in the sense that it can act independently of the natural persons composing it, *or abstain from acting, where it is their will that it shall*, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.”

And again:

“On a question of this kind, the fact must constantly be kept in view that the metaphysical

entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act."

The case of *People of New York vs. North River Sugar Refining Co., supra*, was a case brought by the State of New York against the Sugar Refining Company to annul its charter because it had become a part of an illegal combination of sugar refineries. The crucial question in the case was whether the corporate entity had sinned or simply its stockholders and officers. It differed from the Ohio case in this: that the illegal agreements purported to be agreements of the corporation itself. In this respect it is like the case at bar. The court said:

"The combination therefore framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argu-

ment, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own,—are there without corporate action on their part, and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators, as it were to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure.”

And again:

“The stockholders, by a unanimous vote, decided to go into the proposed combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was therefore actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the

secretary shows had been made by the authorized agency."

And again:

"If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the State in every case of misuse or abuse of chartered powers."

The court concluded that the claim of the state that the acts complained of were corporate acts could "not be defeated by the assumed innocence of a convenient fiction."

(b.) To say that the corporation as such has in its right a cause of action against the whole body of its own stockholders for damages arising from the manner in which the whole body of its stockholders has managed its business is to state a moral, legal and physical impossibility.

The reason why the corporation can complain for injuries done to its property and business by a majority only of its shareholders is, that the acts of the majority are in violation of the agreement,

expressed or implied, or both, which creates the united body of stockholders and under which it operates. No majority, no matter how great, has a right to break and violate this agreement and compact. If damage results from such violation, damage is done to the united body and the dissenting minority, however small, obtains its redress through the united body itself. In this way the rights of the parties can most readily be adjusted. But if all the stockholders are parties to the transaction which causes the injury there are no rights to be adjusted.

The authorities cited by the appellants to sustain his position that a corporation has itself, and in its right, a cause of action against all of its stockholders for a mismanagement in which they all concurred, do not sustain his position.

Cases are cited to the effect that a deed signed by shareholders in their individual capacity will not convey title to the corporate real estate. This is doubtless true, but if all of the shareholders of a corporation should join in a deed of corporate lands and should turn the possession over to the grantee who should commit waste, we apprehend that the corporate entity could not maintain a right of action

in tort against all its stockholders for such a transaction.

Even though the deed might not pass title it would support an action for specific performance.

Anderson vs. Wallace Lumber and Manufacturing Co., 30 Wash. 147;

Bundy vs. Iron Co., 38 Ohio St. 301.

We shall not review all the cases cited by the appellant on this point. It is sufficient to say that no one of them (nor any that we have been able to find) holds that the corporation, *as such*, i. e., the corporate entity, has any rights in excess of or in opposition to the rights of all its stockholders.

In the case of *United States vs. Milwaukee Refrigerating Transit Company*, 142 Federal, 247, cited by the appellant, it is said, by Justice Sanborn, on page 255:

“A corporation from one point of view may be considered an entity without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its constituent parts. The word ‘corporation’ is but a collective name for the members who compose the association.”
And further:

“It seems that an act of all the stockholders as individuals, binds the corporation, as no one can object.”

The same truth is recognized by this court in the case of *Linn and Lane Timber Company vs. United States*, 196 Federal, 493. In the opinion this court quoted with approval the following from *Morawetz on Corporations*, section 227:

“The statement that a corporation is an artificial person or entity apart from its members is merely a description in figurative language of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact.”

See also

Thompson on Corporations, Vol. I, Sec. 10, 2d Ed.

The appellant claims that the case of *Pennsylvania Sugar Refining Company vs. American Sugar Refining Company*, 166 Fed. 254, sustains this action. In that case the Pennsylvania Sugar Refining Company sued the American Sugar Refining Company for damages which the former suffered at the hands of the latter in violation of the Sherman act. It was not a case where the plaintiff was attempting to sue all of its stockholders for damages which it claimed to have suffered by reason of the act of all its stockholders.

Nor does the case of *Hays vs. Kenyon*, 7 R. I. 136, sustain his contention.

In that case the defendant, president of a bank, sold his stock to “worthless adventurers and took payment not from them but by carrying off and appropriating to his own use all the valuable assets of the bank.” This was fraudulent as to creditors and the court properly held that the receiver could, as representing creditors, consider the transfer of the corporate property as void as to creditors and charge him with the value. There is nothing in the case that distinguishes it in principle from any other action by a receiver to avoid a fraudulent conversion by directors of the corporate assets.

The appellant claims that the idea of the distinct legal entity of a corporation will not be disregarded except when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. Courts have said that the distinction will never be maintained when to do so would defeat public convenience, justify wrong, protect fraud or defend crime; but none of them have said, so far as we have been able to discover, that it would in all other cases be recognized. What they have said, and what is the only rule that comports with the obvious truth, is that they will recognize the fact that the corporation has no rights

beyond or antagonistic to the whole body of its constituent members.

However, it would be a gross wrong to permit a corporation, by its receiver, to recover from its stockholders treble damages for corporate management that all the stockholders consented to. It is difficult to conceive how any greater misuse of the fiction could be made.

The fact that there may be creditors who will share in the recovery does not alter the situation in the least. For, if the corporation, *in its own right* (and this is the appellant's contention) has a right of action at all, it would have it with or without creditors. The right of the receiver to maintain this action in the right of the corporation does not depend upon the existence of creditors.

It is perhaps not strange that we have been unable to find many cases where the court has been called upon to consider the question of the right of a corporation to maintain an action in its own right against all its stockholders for injuries done by them to its property. The question was, however, considered in the case of *Hayes vs. Parsons*, 14 Abbott N. C. (N. Y.) 419. In that case Sedgwick, Ch. J., said:

“Again, considering that the fundamental position is, that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties; the corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title for the pecuniary benefit of the shareholders having no beneficial or pecuniary benefit in it.

“On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident, that the corporation could not claim as damage to its interest what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury.

“In fact, however, the case is a little different in point of circumstance, although not essentially. The beneficial owner or shareholder having in advance of the occurrence, which but for their participation would have created a cause of action in the corporation,

promoted it and then participated in it, the conduct of the trustees never made a cause of action because that conduct was not wrongful as respects the shareholders. The principles that have now been used are established by *Scott vs. Depeyster* (1 Edw. Ch. 513); *Hotel Co. vs. Wade* (97 U. S. 13); *Kent vs. Quick-silver Mining Co.* (78 N. Y. 159). It is not necessary to give the reasoning of these cases; they are applicable here. It is supposed that in the last case there is a difference, in that acquiescence of shareholders was held to estop them in favor of innocent third parties. But it must be considered that after the power to ratify or acquiesce is held to exist, the same principle would act in favor of third parties although not innocent, against whom damages for the act ratified were claimed.

“It seems to be clear that Catlow could not maintain an action like this, first, because he could not claim that the corporation should bring an action for his benefit on account of a transaction which he took part in, and second, *because the corporation would have no cause of action or right to damages.*”

The question arose also before the Supreme Court of Colorado in the case of *Arkansas River Land, etc., Co. et al. vs. Farmers Loan & Trust Co., et al.*, 13 Colo. 587, 22 Pac. 954. It was attempted in that case to assert the right of the corporate entity to avoid a fraudulent transaction assented to by all its stockholders and affecting the corporate property. The court said:

“The questions presented for consideration are certainly novel in their character. It may well be doubted whether a body corporate, or the shareholders of a corporation, ever presented a parallel case to a court of law or equity. Upon the oral argument it was practically conceded that the individual plaintiffs were not entitled to relief. Nevertheless it was contended that the corporation itself was entitled to consideration, because, being but a legal entity, and having no existence except in legal contemplation, it was incapable of participation in the illegal and fraudulent transactions detailed in the bill and established by the evidence. This contention affords one of the most extraordinary instances of an attempt to separate the body corporate from its constituency which has arisen in the history of corporate litigation. That it cannot be sustained is clear upon principles so long established as to be elementary. Plaintiffs in error are confronted with these principles at the very threshold of their case.

“From the conceded facts it appears that, at the time the contract was made and executed, the issuance of the bonds, and the execution of the trust-deed to secure the same, authorized, and all the capital stock distributed, the parties participating in these transactions were the entire constituency of the corporation. There was no dissenting voice. The corporation itself, therefore, was not only involved in, but must be deemed to have assented to, all these transactions.”

5. Inasmuch as it is conceded that the plaintiff here is suing in the right of the corporation and not in the right of creditors it is unnecessary to dwell long upon the rights of the creditors. However, the question may be suggested whether the receiver would have the right to maintain this action in the right of creditors, even though the corporation itself could not maintain it. This question may be readily disposed of. As we have suggested above, this action must be sustained if at all as an action under section seven of the Sherman act. A receiver of an insolvent corporation often does have the right to bring actions which the corporation itself could not bring, but they are always and without exception, actions which the creditors themselves could bring or which are by special statute vested in the receiver for the creditors and which he is required or allowed to bring in their stead for convenience. There is never a right of action in the receiver on behalf of creditors otherwise.

It must be, and as we understand it, is, conceded that the injury done to the "business or property" of a corporation is not such a direct injury to one of its creditors as to give that creditor a right of action for damages under section seven of the Sherman act.

See appellant's brief, pp. 10, 20, 59, 61, 125, 127, 138.

Loeb vs. Eastman Kodak Co., 183 Fed. at page 709.

If the creditor himself has no right of action the receiver has none in the right of such creditor.

The correct rule is stated by Judge Comstock in the case of *Curtis vs. Leavitt*, 15 New York, p. 44:

“The appellant, as receiver, has no interest in or power over the property affected by the trusts in question, except such as he derives under the statutes which have been mentioned. It has been said in this, as in other cases, that he represents the creditors and the stockholders, but for all the purposes of inquiry into his title, he really represents the corporation. He is by law vested with the estate of the corporate body, and takes his title under and through it. It is true, indeed, that he is declared to be a trustee for creditors and stockholders; but this only proves that they are the beneficiaries of the fund in his hands, without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties, in respect to the corporate estate, it is possible to form a conception of rights, legal or equitable, belonging to the shareholders as individuals, which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation, if it were still in existence,

solvent, and no receivership had been constituted. In regard to creditors, I should certainly incline to take the same view of his rights and powers under the statutes referred to. It has, however, been uniformly assumed, and was not denied on the argument, that he succeeds to the rights of creditors, *and takes his title under them*, where conveyances have been made in fraud of their rights, but otherwise valid.”

Moreover, if there were any right of action in the creditors for direct injury to their property or business under section seven of the Sherman act, it would be an action in tort *against* the corporation and not an action to reach corporate assets conveyed in fraud of their rights. It, therefore, would not pass to the receiver.

B.

THE ACTION WAS NOT COMMENCED WITHIN THE TIME LIMITED BY LAW.

Paragraphs XXI to XXIII of the complaint contain the allegations by which the appellant seeks to avoid the Statute of Limitations. (Trans. pp. 37 to 40.) In these paragraphs it is alleged that there was deception practiced upon, concealment from, and lack of notice, and knowledge by, the creditors and depositors of the Washington Bank, and by the receivers of the Nevada Bank (consolidated bank)

appointed by the Alaska court, which receivers had taken possession of and administered upon, as a part of the assets of said consolidated bank, the assets which it had acquired from the Washington bank.

It is now conceded by the appellant that all these allegations are immaterial. He now bases his claim that the Statute of Limitations has not run upon the propositions:

(a) That this action is brought in the right of the corporation, the Washington bank, and not in the right of the creditors; and therefore knowledge or lack of knowledge on the part of the creditors and depositors is immaterial.

(b) That the knowledge or notice that will start the Statute of Limitations running must be knowledge or notice of the corporation itself.

(c) That there was no knowledge or notice on the part of the corporation *as such*, because it had no capacity to receive notice or knowledge, and no power to sue.

(d) That it had no such capacity to receive knowledge or notice, and had no power to sue be-

cause of the fact that all its officers and all its stockholders had participated in the fraudulent acts.

(e) That not until appellant was appointed receiver of the Washington bank in May, 1915, did the corporate entity, as distinguished from the whole body of its officers and stockholders, have a representative who could receive knowledge and notice on its behalf.

The appellant on this branch of the question is confronted with the same difficulty as in his attempt to show a cause of action. If it were true that there is a substantial, real right in the corporate entity in excess of and hostile to the rights of the whole body of its stockholders, then it would follow that the corporate entity must be able in some manner to take notice and have knowledge of such rights, and of the infringement thereof.

With respect to the disability to sue, it is plain that this disability arose from the fact, and that fact only, that all its stockholders had consented to what had been done, and that consequently the corporate entity, which is but the association of these stockholders, had no right to sue. The corporation had a full complement of officers and stockholders. It was not incapacitated from

suing. The only difficulty was that none of the persons constituting the corporation had been injured. The inability of the corporate entity to sue arose from a lack of right, and not from a lack of power.

With reference to the lack of notice to the corporate entity it is sufficient to say that it is a legal and physical impossibility that knowledge and notice to all of the officers and all of the stockholders of a corporation shall not under any and all circumstances be knowledge and notice to the corporation. This for the simple reason that there cannot possibly be anything more in the corporate entity to ^{which} ~~whom~~ knowledge or notice could be given or imputed. Appellant's position in this regard rests upon the wholly untenable proposition upon which his whole case is based; i. e., that when there has been abstracted from the corporate entity all its stockholders and all its officers and all their rights, there are still some rights left.

The appointment of the appellant as receiver of the Washington bank did not alter the situation in the least. It is claimed by the appellant that he by such appointment became the representative of the corporation, and that it thereby was through him first clothed with the capacity to receive knowl-

edge and notice. In general, the receiver represents the corporation, its substance, its constituent members. But what does the receiver represent when he attempts to assert this cause of action? He claims that he represents the corporate entity alone, stripped of all its substance. He admits that he cannot assert this cause of action in the right of creditors. In this he is correct. Therefore, his right to sue does not depend upon the existence or non-existence of creditors. If the corporate entity as such has a right of action it would have had it if there were no creditors. In such a case we would be presented with the strange anomaly of the corporate entity suing its own stockholders for mismanagement of corporate affairs to which they all consented, and the damages recovered would be for the benefit of the same persons who would have to pay the judgment. How, then, can it be claimed that the receiver for the purpose of asserting this cause of action is the representative of anything or anybody?

It is, perhaps, not necessary to pursue the discussion further, but we beg to submit the following:

We concede the statute of limitations of the State of Washington governs.

The lower court correctly held that this case fell within subdivision six of section 159, Remington & Ballinger's Code of Washington, limiting to three years,

“An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty (limitations).”

Counsel argue that this is erroneous because actions of this sort are not penal, and cite *Chattanooga Foundry Co. vs. Atlanta*, 203 U. S. 390, and kindred cases in support of their position. They lose sight of the fact that the recovery of treble damages under the seventh section of the Sherman Act is granted as a remedy for a private wrong and is compensatory in its purpose and effect, and that the section quoted is manifestly directed to the collection of a statutory compensation and not to the imposition of a penalty upon the wrong doer; else why the clause, “*where an action is given to the party aggrieved?*” The precise point was presented and unanswerably decided in *Harvey vs. Booth Fisheries Co.*, 228 Fed. 782.

Appellant contends that this suit is controlled by subdivision 4 of section 159, Remington & Ballinger's Code, limiting actions for relief upon the

ground of fraud to three years after discovery by the aggrieved party of the facts constituting fraud. Even if this subdivision does apply it will not help the appellant.

Before addressing ourselves to this proposition we wish to call attention to the settled policy of the State of Washington upon the statute of limitations.

“These statutes announce a public policy. It is believed that it is better for the public that some rights be lost than that stale litigation be permitted. It follows, therefore, that, when the limitation of the liability fixed by the statute is doubtful or debatable, it should be so construed as not to contravene that policy.”

Thomas vs. Richter, 88 Wash. 451-456, 153 Pac. 333-336.

Where, as here, the receiver is suing in the right of the corporation, the statute runs against the receiver when it has run against the corporation.

Hawking vs. Donnerberg, 66 Pac. 691.

Chilberg vs. Siebenbaum, 41 Wash. 663.

The answer to appellant's proposition is that no fraud other than that upon which the action is predicated is even suggested in the complaint. Had there been some independent act which precluded the institution of an action to redress the

primary fraud there might be something in his position. He fails, however, to distinguish between that fraud which gives birth to a cause of action and that fraud which prevents a suit thereupon.

There is no denial that the facts were there and visible to all who wished to see. The legal effect thereof is the only thing which seems to have been undiscovered.

It is elementary that mere failure to discover a cause of action is not enough to toll the statute, but a party seeking its extension must aver and show that he used due diligence in his own behalf and has not slept upon his rights. But in this case no excusatory facts are pleaded. To the contrary the complaint is replete with allegations which show that the plaintiff and everyone connected with the institution have been in possession of facts which would put an ordinarily prudent person upon inquiry, and which, if followed up, would necessarily have disclosed the very points upon which this suit is predicated. As put by Judge Neterer in his opinion in the court below:

“The allegations of the complaint to avoid the bar were not the want of knowledge of the facts but rather want of legal information upon the facts.”

The appellant's claim that no one in Alaska could be charged with the knowledge of the laws of Nevada or of Washington is of no force. This is a Washington corporation which is suing and it is certainly charged with knowledge of the Washington law. It dealt with the Nevada corporation and was equally charged with the knowledge of its powers. Furthermore, a sale of shares to the Nevada bank and a consolidation, even if contrary to the Nevada law, would not constitute a violation of the Sherman Act, for which alone this action could lie. It is the violation of the Federal law, and that alone that must give life to the plaintiff's action. Consequently ignorance of the Nevada law is wholly immaterial. And if there was any fraudulent intent it was so by reason of the general law which obtains in Alaska as elsewhere.

There is no charge that the defendants or any of them made any active or even passive effort to prevent the timely appointment of a receiver of the Washington Bank or that they did anything directly or indirectly which prevented the institution and maintenance of a suit against them.

The point is made that even after his appointment by the Alaska courts the plaintiff as such receiver could not have maintained this suit in the

State of Washington. There is, however, no contention made that the defendants or any of them obstructed the appointment of an ancillary receiver or did anything else towards preventing the timely commencement of this action.

Conceding that concealment by a defendant of a cause of action against him upon the ground of fraud will operate to suspend the statute of limitations until discovered, we submit that there was no such concealment here, but, to the contrary, no facts excusing or tending to excuse the failure to discover plaintiff's cause of action, if any, are pleaded. A perusal of the complaint will, we believe, fail to disclose any allegations which make it appear that the fraud could not have been discovered immediately upon the exercise of ordinary diligence, and for that reason the action is barred. The most recent case which we have found upon a statute similar to ours is *Montgomery vs. Peterson*, decided June 17, 1915. It was there said:

“Subdivision 4 of Section 338, Code of Civil Procedure, provides that in the case of fraud or mistake the action must be commenced within three years after the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this state it is not enough to assert that the discovery was not sooner made. It must appear that it could not have been made by the exercise

of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced. *Truett vs. Onderdonk*, 120 Cal. 581, 53 Pac. 26; *Lady Washington Co. vs. Wood*, 113 Cal. 482, 486, 45 Pac. 809; *Del Campo vs. Camarillo*, 154 Cal. 647, 98 Pac. 1049. See also, *Wood vs. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807."

Montgomery vs. Peterson, 151 Pac. 24 (Cal.).

As said by the Supreme Court of the State of Washington:

"Construing this section, this court has held in a number of cases that whatever is notice enough to excite attention and put a party upon his guard, or call for an inquiry, is notice of everything to which such inquiry might have led. 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery,—equivalent to knowledge.' *Deering vs. Holcomb*, 26 Wash. 588."

McDonald vs. McDougall, 86 Wash. 339-342.

Irwin vs. Holbrook, 32 Wash. 349.

Uhlbright vs. Mulcahey, 78 Wash. 9.

Garbutt Lbr. Co. vs. Walker, 64 S. E. 698 (Ga.).

Little vs. Reynolds, 28 S. E. 919 (Ga.).

Boom vs. Boom, 85 S. W. 48-51 (Tex.).

Scott vs. Boswell, 118 S. W. 521 (Mo.).

Shelby vs. Brogy, 36 S. W. 602 (Mo.).

Provident Life vs. Withers, 116 S. W. 350 (Ky.).

Gordon vs. Rhodes, 117 S. W. 1023-1027 (Tex.).

Howell vs. Bork, 158 S. W. 574 (Tex.).

Kinder vs. Scharff, 55 So. 769 (La.).

Van Ingen vs. Duffin, 48 So. 507 (Ala.).

Brockett vs. Perry, 87 N. E. 904-4.

“The fact that a person entitled to an action has no knowledge of his right to sue, or the fact out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns his right thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect there must be something done to prevent discovery. Something which can be said to amount to concealment.”

State vs. Walters, 66 N. E. 182.

The argumentative allegations contained in paragraph XXIII are more in the nature of conclusions of law than of averments of fact.

Edwards vs. Smith, 29 S. E. 129.

There is absolutely no excuse for the delay,

nor is a sufficient one alleged in the complaint.

Jones vs. Woodward, 151 Pac. 587.

The complaint abounds with allegations of fact and circumstances existing and apparent, which if followed up would have developed the ultimate facts upon which this suit is based. These though coupled with a positive denial of the discovery of fraud are enough to start the statute and render the complaint demurrable.

Wood vs. Carpenter, 101 U. S. 135.

Tucker vs. Weatherbee, 82 S. E. 638-640.

Griffin vs. Seattle Consolidated Ry. Co., 36 Wash. 627.

Uhlbright vs. Mulcahey, 78 Wash. 91.

In the court below the defendants laid considerable stress upon the case of *Sterns vs. Hochbrunn*, 24 Wash. 206, in which it was held that a complaint is sufficient as against demurrer when it contains a direct and positive statement of the time of the discovery of the fraud without further negating the idea that the fraud might have been discovered sooner; but in that case the complaint contained no allegations of fact which would excite suspicion or tend to place the plaintiff upon inquiry. Nor were there any facts charged which were inconsistent with the bare allegation of failure to discover.

In the later case of *Griffin vs. Seattle Consolidated Ry. Co.*, 36 Wash. 627, *supra*, the *Hochbrunn* case was distinguished upon these grounds, and the court said, at page 634:

“In the case cited (*Stearns vs. Hochbrunn*) there was a direct and positive averment as to the time of discovery, and it does not appear that there were any other statements in the complaint inconsistent with such averments.”

Griffin vs. Seattle Consolidated Ry. Co., 36 Wash. 627.

From this it follows that when the complaint shows facts which would excite inquiry by an ordinary man, the pleading must do more than merely negative discovery. It must show circumstances which excuse and allege facts from which the court can decide whether the plaintiff was sufficiently diligent in acquainting himself with the particulars at his command. The means of knowledge are its equivalent. The statute does not distinguish between actual and constructive knowledge, and the latter is sufficient to start the limitation. If this is so, the demurrer was properly sustained and the complaint clearly shows facts which constitute constructive knowledge, thereby bringing the case within the statute.

“The only allegation as to when the plaintiff learned of the frauds complained of is

that ‘plaintiff did not know nor have notice of or have the means of knowing or discovering said acts of fraud hereinbefore specifically alleged until within three years next before the commencement of this action.’ Such general allegation is insufficient to take an action for relief on the ground of fraud, occurring more than tree years before the commencement of the action, out of the bar of the statute. *People vs. San Joaquin Valley Agr. Assn.*, 151 Cal. 797, 91 Pac. 740; *Truett vs. Onderdonk*, 120 Cal. 589, 53 Pac. 26; *Lady Washington Co. vs. Wood*, 113 Cal. 486, 45 Pac. 809; *Lant vs. Manley* (C. C.) 71 Fed. 7. ‘He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret, or were kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged.’ *Lady Washington Co. vs. Wood*, *supra*; *People vs. San Joaquin Valley Agr. Assn.*, *supra*.”

Denike vs. Santa Clara Valley Agr. Society, et al., 98 Pac. 687-688 (Cal.).

“The language employed in the statute, ‘until discovery of the fraud,’ does not mean until the party complaining had actual knowledge of the fraud alleged to have been committed, but that constructive notice of the fraud is sufficient to set the statute in motion, even though there is no actual notice; that where the means of discovery lie in public records required by law to be kept, involving

the very transaction in hand ,and the interets of the parties to the litigation, the public records themselves are sufficient notice of the fraud to set the statute in motion.' *Black vs. Black*, 64 Kan. 689, 704, 68 Pac. 662, 666. 'Constructive discovery resulting merely from a statute, under such circumstances that the aggrieved person, although actually diligent, had no reasonable opportunity to learn of the facts constituting the fraud, may not be sufficient to set the statute in operation, but constructive discovery resulting from his failure to be diligent when diligence would have disclosed the fraud practiced upon him will always do so.' *Donaldson vs. Jacobitz*, 67 Kan. 244, 247, 72 Pac. 846-847."

Duphorne vs. Moore, 107 Pac. 791-792 (Kan.).

Jackson vs. Jackson, 47 N. E. 963.

"He should have alleged that he was in fact diligent to the extent of the efforts made by him to discover the fraud alleged."

Edwards vs. Smith, 29 S. E. 129.

"The rule of pleading, as indicated by the authorities, where one seeks to avoid the bar of the statute on the ground of fraud, is that he must allege the facts upon which he relies, so the court may determine from the pleadings whether he is entitled to the relief sought; assuming, as must be done on demurrer, such allegations to be true. *If, as has been well said, it appears from the complainant's own allegations that the means were at hand to readily discover the fraud complained of*, and such means of information would have been used by a person of ordinary care and prudence in the transac-

tion of his own business, then he will be held to have had notice of everything which a proper use of such means would have disclosed; and failure to avail himself of such means or avenues of information appearing, the issue presented is one of law for the decision of the court and not a question of fact for the determination of the jury."

Boren vs. Boren, 85 S. W. 51 (Tex.).

A large part of appellant's argument is based upon the proposition that where there is a fraud which prevents a person from maintaining an action against another the equitable rule of estoppel will apply. He fails to distinguish between that fraud which gives rise to the cause of action and one which prevents the institution of a suit to redress the wrong. On the other hand, there is not a single word which shows or tends to show that any acts fraudulent or otherwise were committed which prevented the obtaining of any redress by anybody entitled thereto. And here lies the distinction which counsel overlook. The fraud described is the gist of the action. The statute of limitations began to run from the time when those facts were, or in the exercise of ordinary caution should have been, discovered. This fraud did not bar the running of the statute but was the very basis of the suit. On the other hand, had there

been any independent fraud which prevented an action to redress the first fraudulent acts then an estoppel would have ben created.

The sum of appellant's argument seems to be that had no receiver ever been appointed the statute of limitations would have never run against this action. The proposition is too absurd to require argument.

It is claimed in the appellant's brief, and it may be inferentially in the complaint, that the sale of the shares by the stockholders of the Washington bank to the Nevada bank, and the consolidation of the two banks was forbidden by the laws of Nevada. Whether the laws of Nevada or Washington, in truth, forbid either the sale of stock or the consolidation, is not involved in this appeal. For, if this suit can, under the allegations of the complaint, be maintained at all, it could be maintained no matter whether the Nevada laws or the Washington laws prohibited the sale, if it was made for the fraudulent and unlawful purpose alleged. We make this statement because the appellant has made no attempt to argue in his brief that the Nevada law or the Washington law has any such effect, doubtless taking the same view as

ourselves that the question is not here involved. We make the statement for the further reason that whether there is anything in either the Nevada law or the Washington law prohibiting either the transferring of the shares or the consolidation, is a question that should not be decided by the court without its being fully presented and argued.

It is respectfully submitted that the judgment should be affirmed.

CLISE & POE,
PETERS & POWELL,
Attorneys for Respondents.

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a
corporation organized under the laws of the State of
Washington,

Plaintiff in Error,

v.

W. H. PARSONS and JANE DOE PARSONS, his wife,
FALCON JOSLIN and JANE DOE JOSLIN, his wife,
JOHN SCHRAM and JANE DOE SCHRAM, his wife,
E. L. WEBSTER and JANE DOE WEBSTER, his wife,
J. W. CLISE and JANE DOE CLISE, his wife,
F. E. BARBOUR and JANE DOE BARBOUR, his wife,
and WASHINGTON SECURITIES COMPANY, a corporation,
Defendants in Error.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

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No. 2838

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington,

Plaintiff in Error,

v.

W. H. PARSONS and **JANE DOE PARSONS**, his wife,
FALCON JOSLIN and **JANE DOE JOSLIN**, his wife,
JOHN SCHRAM and **JANE DOE SCHRAM**, his wife,
E. L. WEBSTER and **JANE DOE WEBSTER**, his wife,
J. W. CLISE and **JANE DOE CLISE**, his wife,
F. E. BARBOUR and **JANE DOE BARBOUR**, his wife,
and **WASHINGTON SECURITIES COMPANY**, a corporation,
Defendants in Error.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

Defendants in error devote most of the part of their brief dealing with the cause of action to insisting that the three conspiracies—that of 1905, that of May, 1909, and that of September, 1909—are in reality but one conspiracy, and say the complaint itself so asserts.

Whether there Were Three Conspiracies or One Is a Question of Law for this Court to Decide from the Allegations of Fact in the Complaint, Independently of Any Conclusion of Law Drawn by the Pleader.

It is immaterial what conclusion of law the pleader, in framing the complaint, may have arrived at on this question of one or three conspiracies. The question is whether the *facts* set up constitute three conspiracies or one. That is for this Court to determine, not for the pleader. Whether any conspiracy at all is alleged is a matter of law, and whether the facts alleged constitute three conspiracies or one is also necessarily a matter of law.

Let us look at some of those facts. Greenleaf, in dealing with the evidence of conspiracy (3 Greenleaf on Ev. (15th ed.), § 93) says "the common design is the *essence* of the charge." This must mean the concrete design common to the conspirators, not a design common to several conspiracies. A design is a plan; a plan is not for the attainment of some abstract purpose,—e. g., the restraint of trade,—by some abstract means, i. e., *some* restriction *or other* on the banking business. A conspiracy is a design (a) by *certain* conspirators (b) to do *certain* acts (c) in certain, *definite* ways (d) for the attainment of a certain, precise and *definite* object, and (e) having a certain result if carried out. In other words, these elements are all concrete. To substitute for the elements in this statement the facts of the conspiracy of 1905 and the facts of the conspiracy of September, 1909: The conspiracy of 1905 was a design (a) on the part of the three banks and their

boards of directors (b) to fix certain high rates and charges for services to customers (c) by means of the contractual concurrence therein by all three of the banks (d) so that each of the banks could make more money than it otherwise would, (e) resulting in the fettering and controlling of the banking business at Fairbanks and environs, leaving, however, each of the three banks still in existence and undominated by the others and free to engage in said banking business and to compete for business against the others, though under the restrictions of the said contract. The elements of the conspiracy of September, 1909, were in several respects very different indeed from those of the conspiracy of 1905: The conspiracy of September, 1909, was a design (a) on the part of one bank (the Nevada Company) and its directors and the stockholders of another bank (the Washington Company)—not as stockholders but as individuals—(b) to throw the Washington Company entirely into the control of the Nevada Company, (c) by means of a transfer of the stock of all the stockholders of the Washington Company to the Nevada Company and the substitution of dummy directors by the Nevada Company for the legal directors of the Washington Company, (d) so that the Nevada Company and the stockholders of the Washington Company — not *as* stockholders but in their personal capacities—could make more money or “quicker” money, (e) resulting in the fettering and controlling of the banking business at Fairbanks and environs by eliminating the

Washington Company, and resulting also, incidentally, in the loss of its assets by the Washington Company (for which loss we herein sue).

So we say that these conspiracies are, as a matter of law, different. Without repeating the details of the conspiracy of May, 1909, that is as distinct from the conspiracies of 1905 and September, 1909, as the latter two conspiracies are distinct from each other.

It Is Not Necessary that the Statement of the Gist of the Action, Apart from the Matter of Inducement, Should Set Forth a Cause of Action; It Is Sufficient if Gist and Inducement, Construed Together, State a Cause of Action; Moreover, the Complaint, in Its Statement of the Gist Alone, Charges a Violation of the Sherman Act.

The defendants assert that unless the conspiracy of 1905 is relied upon by the plaintiff, the complaint alleges no conspiracy in violation of the Sherman Act. We can think of but two possible meanings which could have been intended by this statement. If defendants mean (1) that if the matter of inducement be eliminated the remainder of the complaint must in itself state a cause of action or the complaint is bad, the assertion is unfounded in and contrary to the rules of correct pleading. If they mean, to use their own words, (2) that paragraph XV and subsequent paragraphs "contain no allegation of a combination or conspiracy that in any degree tended to restrain trade or commerce," their position is equally untenable, for the *necessary* effect of the elimination of one of the banks through

its wrongful absorption by another bank was to limit and restrict, throttle and control the business of banking in Fairbanks and environs further and more than was the fact prior to the formation and execution of the conspiracy of September, 1909. Let us consider these two propositions.

As to the question of pleading. Usually a complaint in which there is matter of inducement would fail to state a cause of action if the inducement matter were stricken out and only the allegations constituting the gist of the action were left. (See Bliss on Code Pleading (2d ed.), §§ 149, 150.)

The complaint herein could undoubtedly have omitted all mention of the conspiracies of 1905 and May, 1909, and have detailed the facts of the conspiracy of September, 1909, just as they are now detailed in the complaint but adding thereto fuller allegations of the purpose and intent with which the last conspiracy was entered upon and consummated; namely, to destroy the Washington Company and thereby to cast the banking business wholly into the hands of the Nevada Company and thus to restrain trade. Possibly that would have been better pleading. Certainly it would have been the statement of a cause of action. The fact that the complaint would thus have stated a cause of action is itself proof that the conspiracy of September, 1909, was a separate and distinct conspiracy from the two prior ones. Instead of drawing the complaint in that way the pleader set up as inducement the prior conspiracies so as to exhibit by the narration of their pre-

vious conduct (instead of by bare allegation of their intention) what was the intention and purpose of the defendants in the transaction of September, 1909, and later.

As to the necessary effect of the acts of the defendants set up in paragraph XV and subsequent paragraphs, and as to whether those paragraphs state facts constituting a violation of the Sherman Act. It is clear that the necessary, natural and direct tendency of the conspiracy of September, 1909, was to suppress every remaining vestige of competition and to concentrate and unite in one hand the whole banking business at Fairbanks and environs. Where such is the natural, necessary and direct tendency of an agreement, combination or conspiracy in a Territory the Sherman Act is violated. (See cases cited on page 71 of our opening brief.) Such was not only the tendency here, but the actual result.

As to whether a contract or combination is in restraint of trade the intention actuating the parties is material only in doubtful cases. The Supreme Court of the United States, speaking by Mr. Justice Lurton, in *United States v. Reading Company* (the anthracite coal cases), 226 U. S. 324, 370, said:

“Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade

between the States, the intent with which the thing was done *is of no consequence*. But when there is only a probability, the intent to produce the consequences may become important. *United States v. St. Louis Terminal Association*, 224 U. S. 383, 394; *Swift & Co. v. United States*, 196 U. S. 375.”

But this is not a doubtful case. The natural, necessary and direct result of the act of the defendants in selling their stock to the Nevada Company speaks for itself. It shows what their intent must have been. But if it were a doubtful case, the complaint charges in paragraph XV (tr. p. 24) that the purpose was to effect the absolute concentration and control of the banking business in the hands of the Nevada Company, and that it was the intention of the defendants to bring about the results which actually ensued — a still further suppression of competition by elimination of the Washington Company. In addition to the cases cited on page 71 of our opening brief, see:

Swift and Co. v. United States, 196 U. S. 375, 396, 398;

United States v. Joint Traffic Association, 171 U. S. 505, 568.

So we submit that the objection of the defendants, that if the complaint sets up two conspiracies as inducement and a third as the gist of the action it alleges no violation of the Sherman Act, is not well taken, either as a matter of pleading or as a matter of substance.

A Corporation Is More Than and Different from a Mere Voluntary Association of Persons.

In their brief, page 46, defendants say that “the corporate entity * * * is but the association of these stockholders,” and on page 28 they say, “a corporation outside of and beyond the constituent body of its stockholders is nothing. The corporation is its stockholders working together in unison and for certain purposes by agreement among themselves * * *. This union of its stockholders for definite purposes is the corporate entity.” Substituting “members” for “stockholders” and “association” for “corporation,” this becomes a good description of a voluntary association of persons. But it falls far short of being an accurate description of a corporation. The exigencies of their position drive defendants throughout their brief to assume that a corporation is no more than an *unincorporated* association of persons. It is only so that they can maintain the identity of corporation and stockholders. To admit that a corporation is an entity separate and apart from its stockholders is fatal to their demurrer.

A Corporation Has a Right of Action Against the Whole Body of Its Stockholders for Damages Arising From the Wrongful and Fraudulent Manner in Which They Have Managed Its Business.

At various points in their brief defendants speak of the stock transfer of September, 1909, as “the management of the business” of the Washington Company—an evident fallacy. That transaction

was the private business of the defendants, conducted for their private gain. But assuming that it were corporate business their proposition is wholly unsound. It is utterly refuted by the case of *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343, 345. There a corporation (the Aid Society) was organized exclusively for benevolent purposes and could own and dispose of property for such purposes only. By devise from one of its members it acquired title to some land which contained mineral values. All of the members of the corporation consenting thereto and causing the same, the corporation executed a deed to that land to *all* of its members in equal undivided interests. These members organized a mining corporation (the German Corporation) and deeded the land to it. The Aid Society later took in new members; these new members questioned the legality of the transactions, just described, and the mining company sued them and the Aid Society to quiet its title. The new members disclaimed title, but being in control of the offices of the Aid Society, caused the latter corporation to defend and to file a cross-bill to quiet *its* title. The prayer of the cross-bill was granted. The Court said:

“The Aid Society was not really a party to the deed of the mineral rights. Every officer and member of the society was interested on the other side. The officers and members represented themselves. The corporation of which they were officers and members was not represented in the transaction. The officers and members dictated the terms of the sale, directed the

execution of the deed, executed it themselves, and delivered it to themselves. The deed, therefore, was not, either in law or fact, executed or delivered by the society to its officers and members, but by its officers and members to themselves. The deed to the old members must be held void, because made upon inadequate consideration by and for the benefit of those in control of the corporation, and also for want of the necessary element of two parties to the contract. *Miner v. Ice Co.*, 93 Mich. 97 (53 N. W. 218, 17 L. R. A. 412); *People v. Township Board*, 11 Mich. 222; *Railway v. Dewey*, 14 Mich. 477.

“* * * The position taken by complainant that, inasmuch as all of the officers and members of the society, at the date of the transaction, were parties to it, neither the corporation nor the new members will be admitted to complain, is unsound. *Clark & Marshall on Private Corporations*, p. 2297, and cases collected in note 565.

“A corporation is a legal entity and artificial person distinct from its stockholders or members as individuals, and that it may, by a proper action, in the proper court, recover property owned by it, which is unlawfully withheld by its officers and members in control of its affairs, is entirely clear, *and the fact that all of its members happened to be in opposition does not alter the case*. In such a situation a corporation may sometimes be unable to get into court, but being in *it may demand of all of its members*, as well as of a part, the restitution of property unlawfully appropriated.”

This Michigan case, we submit, effectually disposes of much of defendants' brief. It disposes of the statement on page 33 thereof:

“To say that the corporation as such has in its right a cause of action against the whole

body of its own stockholders for damages arising from the manner in which the whole body of its stockholders has managed its business is to state a moral, legal and physical impossibility.”

It disposes effectually of this statement on page 37 thereof:

“What they [the courts] have said, and what is the only rule that comports with the obvious truth, is that they will recognize the fact that the corporation has no rights beyond or antagonistic to the whole body of its constituent members. * * * it would be a gross wrong to permit a corporation by its receiver, to recover from its stockholders treble damages for corporate management that all the stockholders consented to.”

It disposes of defendants’ statement on page 34 of their brief:

“* * * if all of the shareholders of a corporation should join in a deed of corporate lands and should turn the possession over to the grantee who should commit waste, we apprehend that the corporate entity could not maintain a right of action in tort against all its stockholders for such a transaction.”

We apprehend that the corporate entity *could* maintain an action in tort against all its stockholders for such a transaction if the commission of waste by the grantee was the natural consequence to be expected from the making of the deed and the surrendering of possession to him. It is said by defendants (their brief, p. 35) that “Even though the deed might not pass title it would support an ac-

tion for specific performance," and two cases are cited to this proposition. The first one, *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, does not bear on the point at all; there a written memorandum of sale and purchase was signed by the officers and three out of four trustees actively participated in the transaction, and specific performance was decreed. The other case, *Bundy v. Iron Co.*, 38 Oh. St. 301, was a suit to foreclose a mortgage, and the decree amounted to the reformation of an instrument and the enforcement of it in the same suit; the corporation had received and used the money and had promised to execute a mortgage; by mistake the mortgage was executed in the names of the stockholders; the case was, of course, in equity, and if it has any bearing on the principles here involved it falls within the exceptions mentioned in our opening brief, that is, the stockholders were considered as identical with the corporation in order to prevent a wrong.

The contention of defendants that a corporation is identical with the whole body of its stockholders may be represented as an equation in mathematics: the corporation=all stockholders of the corporation. Then, if it is a true equation, the converse must be true: all the stockholders=the corporation. But this is untrue in law, as our opening brief, pages 23 to 28, points out. (See also *Tapscott v. Mexican Colorado River Land Co.*, 153 Cal. 664, 96 Pac. 271.)

The Corporation Did Not Act in the Transaction of September, 1909, but if It Had Acted Therein It Could Still Recover Against These Defendants.

Defendants say (their brief, p. 4) that the Washington Company was a party to the contract and conspiracy of September, 1909:

“It is claimed by the plaintiff that the Washington bank, having suffered damage by this conspiracy, *to which it was a party through the action of all its stockholders*, has a right of action against its stockholders for such damage, and that the plaintiff, as its receiver, has succeeded to that right of action.”

And they assert that because it was a party to that conspiracy it cannot recover herein. But yet they admit (their brief, pp. 33-34) that if a majority of the stockholders do a wrongful act injuring the corporation, the corporation can recover against them. And we suppose they would admit the well-established principle that if the directors, *by action as a board, and therefore by corporate action*, defraud the corporation, the corporation can recover against such directors as soon as it gets into such hands that it can sue; or a stockholder, *suing in its behalf*, can recover for it. Yet in such case the corporation, *by corporate action*, has done the very thing by which it complains it was injured. Such were the cases cited and discussed on pages 49 to 58 of our opening brief. Those cases flatly hold that where a corporation has been thrust by those controlling it into wrongful action, through which it sustains injury, it has a right of action against

them. None of those cases was in right of creditors. They were all suits in right of the corporation itself. That is true of *Hayes v. Kenyon*, 7 R. I. 136, no less than of the others, notwithstanding the statement to the contrary in the defendants' brief, as a careful reading of the case in full will disclose. This right of recovery exists and applies not only against directors and officers, as said cases show, but against "the whole body of the stockholders," as the Michigan case involving the German Aid Society, heretofore discussed, amply demonstrates.

Most of These Defendants Are Also Charged as Directors with Violating the Sherman Act.

The defendants dwell with emphasis upon the fact that they are charged as stockholders, but seem not to notice that most of them are charged also as directors. The individual defendants who were directors of the Washington Company and who stepped out of office to make room for the dummy appointees of the Nevada Company, all in pursuance of the conspiracy of September, 1909, in restraint of trade, (paragraph XX of the complaint, tr. pp. 35-36), are guilty of violating their trust as directors and of making it possible for the Nevada Company to despoil the Washington Company. If they had continued to discharge the duties of their office according to their legal obligations there could have been no execution of the conspiracy in restraint of trade, notwithstanding the stock transaction. By violating that duty they, *as directors*,

participated in the conspiracy, and they are therefore liable to the Washington Company for losses traceable to their wrongful conduct in surrendering their places to the dummy appointees of the Nevada Company. It cannot be said that by their said surrender of the directorate the Washington Company itself participated in the conspiracy. On this point the ruling in *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 261, is clear. (See quotation therefrom on pages 55-56 of our opening brief.) Hence, not only are all of the defendants liable in this action because they turned their stock over to the Nevada Company, but defendants Schram, Clise, Joslin, Parsons and Webster are liable to the Washington Company herein for the damages it sustained through their surrender of the directorate. (Paragraph VII of the complaint, tr. pp. 5-6.)

This Action Is Directly in Right of the Corporation and Indirectly in Behalf of Whomsoever Is Entitled to Payment From Its Funds.

Defendants insist that because this action is in right of the corporation, the fact that there are unpaid creditors in a very large sum must not be considered by this Court. But inconsistently they say that if a single stockholder's interests had been damaged, the corporation could recover herein; inconsistently, because they admit, by citing *Loeb v. Eastman Kodak Co.*, 183 Fed. 704, that such stockholder would himself have no right of action for the indirect injury done him through an injury to the

corporation, but that the right of action would be in the corporation alone. The interests of both stockholders and creditors in any recovery herein are indirect. Then why, since neither could maintain this action, can the corporation recover when a stockholder is indirectly injured but cannot recover when creditors are indirectly injured? This Court is no more bound to exclude from its view the fact that there are creditors who are indirectly injured by the acts of these defendants in violation of the Sherman Law and injurious to the Washington Company, than it would be bound to shut its eyes to the indirect injury to a stockholder by such acts. Indeed, creditors' rights rank ahead of those of stockholders, whether the corporation be solvent or insolvent: if solvent, the corporation has no right to divide its capital or any part of it among its stockholders before its debts have been paid; if insolvent, its creditors must be paid before distributing the residue to the stockholders.

The fact should not be lost sight of, that this is not an action for dissolution of the Washington Company. Its estate is being administered because it is insolvent. But if it recovers herein it can pay its debts and have a surplus with which to transact business. Is the fact that these defendants are its stockholders, that it has been reduced to its present desperate condition by *their* acts, any argument against its right to be restored to its property and to solvency and to the ability to pay its debts and to resume business? We cannot see that it is.

There Is No Respectable Authority at Law Holding that a Corporation May Not Sue All Its Stockholders.

The defendants confess that they have been unable to find "many cases" supporting their proposition that a corporation cannot sue all its stockholders. They cite but two which they claim support their position, *Hayes v. Parsons*, 14 Abbott N. C. (N. Y.) 419, and *Arkansas River Land etc. Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

Hayes v. Parsons was decided by an inferior court, namely, by the New York Superior Court, General Term. The Court was composed of three judges; one dissented, the second, Judge Ingraham, concurred in only a very small part of what Judge Sedgwick said. Judge Ingraham's concurrence, a brief paragraph on page 435, shows that the actual decision of the Court was that where A receives his stock in exchange for overvalued property, and B, with notice of the overvaluation and of the whole transaction, takes the stock by assignment from A thereafter, B cannot maintain an action for damages against the directors who issued the stock because he stands in A's shoes. Judge Sedgwick's opinion is characterized by self-contradictory reasoning and statements. Thus, he says, page 430, "It is true that the corporation is something more than its trustees and stockholders;" and on page 431 he says that the trustees are the corporation, and also that the stockholders are the corporation. So, in

his opinion, we have all possible views presented; namely, (1) a corporation is separate and distinct from its shareholders, (2) it is its shareholders, (3) it is its trustees.

But the really interesting feature connected with the report of this case is the note of Mr. Abbott thereunder, which discloses that he included the case in his collection for the purpose of showing how wrong are some of the statements in Judge Sedgwick's opinion. At page 437 Mr. Abbott gives the ruling in *Nott v. Clews*, made by a higher court, namely, the Supreme Court of New York, one month after *Hayes v. Parsons* was decided. That ruling was directly contra to the dicta of Judge Sedgwick on which defendants rely. But more interesting still is the citation by Mr. Abbott, at page 442, of *The Society etc. v. Abbott*, 2 Beav. 559, 567, a case directly contra to the dicta of Judge Sedgwick. In that case the Master of the Rolls, Lord Langdale, said:

“A great deal of confusion has almost unavoidably arisen in the course of the argument, by not distinguishing the corporation or corporate body from the individual persons, who at one time seem to have constituted *not the corporation, but all the members of the corporation* (see *Bligh v. Brent*, 2 Younge & C. 295). Unless such a distinction be observed, it would be impossible to come to anything like a satisfactory conclusion upon this occasion. * * * Now it is distinctly stated in this bill, *that the only persons who were at that time interested, were the four persons named*. That, being so, it is alleged in argument, that they had the right

to do what they pleased with respect to that which was to become the property of this corporation, that is, in respect of these shares; and that if, on the one hand, they had the power of incurring responsibility, they had, on the other hand, the power in that way of discharging themselves from it. I confess I cannot concur in that argument.”

And the case by the corporation against all of its stockholders was entertained by the Court.

Arkansas River Land etc. Co. v. Farmers' Loan & Trust Co., the other case cited by the defendants, is no better than their New York case. All of the excerpt which they give in their brief is dictum, for the Court decided that there was no party plaintiff in the case; the individuals had no standing as plaintiffs because the Court held that they were not stockholders; not being stockholders, they were not directors, and were therefore without power to represent the corporation and make it a party plaintiff as they had attempted to do. (See 22 Pac. 958, 959.) But if the matter quoted by defendants were not mere dictum the case would still be without value to them, for it was in equity and falls within the exceptions mentioned in our opening brief, pages 29-30: To prevent fraud and wrong the corporation was said by the Court to be bound by the engagements of its promoters and stockholders — the corporation had received and accepted the benefit of contracts and expenditures under arrangements made by its stockholders and the Court said it should not be allowed to disavow them.

**To Prevent the Running of the Statute of Limitations
Only One Fraud Is Required, Not Two, Though
Here There Were Two Frauds.**

The defendants admit that the stock transaction of September, 1909, was a fraud on the Washington Company, but say that the subdivision of the Washington statute of limitations relative to fraud does not apply, and the statute of limitations was not tolled, because there was not a second and subsequent fraud concealing this first fraud. There is no warrant in law for the proposition of defendants (their brief, pp. 50-51, 60) that to prevent the running of the statute of limitations, and to make subdivision 4 of section 159 of the Washington statute applicable, there must be *two* frauds, (a) the original fraud and (b) the fraud of concealing said original fraud. If defendants were correct, how would they account for that large class of cases of which *Bailey v. Glover*, 21 Wall. 342, is the type, where the fraud is of such nature that it conceals itself? Surely in that class of cases there is no subsequent or second fraud designed and practiced to conceal the first, for by the very supposition the fraud *conceals itself*. But in the cases of fraud concealed by the defendants, instead of by itself, such concealment is not necessarily a separate and independent fraud. It may be but part and parcel of the general original fraud. As Pomeroy says (§ 917, note 2) in his work on Equity Jurisprudence:

“It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This cannot mean

* * * that the fraudulent party must *necessarily* have used some affirmative means to cover up his acts.” (The italics are the author’s.)

But were the law just as defendants claim—were two frauds necessary—they exist in this case and are alleged in the complaint; to-wit, (a) the fraud of the sale of defendants’ stock with the purpose of concentrating the banking business in the hands of the Nevada Company and of despoiling the Washington Company, and with that result, and (b) the pretended consolidation and merger by means of moving the Washington Company’s effects into the Nevada Company’s office, the false announcement of a merger made by defendants and the Nevada Company, the dropping of the name “Fairbanks Banking Company” by the Nevada Company and its assumption of the Washington Company’s name, “Washington-Alaska Bank,” and the subsequent conduct of the business of the two banks as that apparently of one consolidated concern—all by the *knowledge, consent, approval, and arrangement* of the *defendants* as much as by the acts and consent of the Nevada Company, and all with the intention of deceiving everybody concerned or interested in knowing the true facts, and with that result. If this was not a second fraud intended and calculated to conceal the first one, and actually so operating at all times until 1915, then certainly no instance of such second fraud concealing a first fraud can be found in the books or can exist.

But, though as to the creditors the first fraud was concealed by the “second” fraud (and the two frauds were together of such nature as naturally to conceal themselves, as we have pointed out in our opening brief), yet the vital question is solely when and how it should become possible for the Washington Company to institute action against these defendants; for the action is in its right. The obtaining of notice or knowledge by creditors could only be the *occasion* or *incident* from which relief might result to the Washington Company. Such relief could not come until some person or functionary was appointed and given power to act in behalf of the Washington Company. In *Yeiser v. United States Board & Paper Co.*, 107 Fed. 340, 344, 345, the Circuit Court of Appeals, Sixth Circuit, said, after speaking of the trust relation between promoter and corporation and of the duty of full disclosure and good faith:

“Of course, these observations do not apply to a case where the corporation, having knowledge of the facts *and freedom of action*, consents to a contract proposed by another, even though he may be a stockholder or a director. The corporation could not in such case complain, nor could a stockholder, if there had been no actually fraudulent purpose towards him.

* * *

“When, on August 3, 1896, Browne and Stuart made their proposition to sell the mill to their company, and they and their co-operating associates, acting as the board of directors, accepted it for the company, the company was completely in fetters. While it was made to be a purchaser, it was dominated by the seller. It

had no organ for seeing, hearing, or even knowing what was going on. Its whole constituency was engaged in bringing about the sale for the sellers. We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. *Thompson-Houston Electric Co. v. Capital Electric Co.*, 12 C. C. A. 643, 65 Fed. 341; *Wilson v. Pauly*, 18 C. C. A. 475, 72 Fed. 129, 134; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 22 C. C. A. 378, 75 Fed. 433, 469. And see *Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282. *This rule is supported by still stronger reasons where the principal is in such condition that it can by no possibility either learn the facts or have any judgment to form its own course with regard to them."*

The cases cited on pages 53 to 60 of defendants' brief may all be good law, but we respectfully submit that they have no application to the facts of this case.

Defendants say it is absurd to assert that if no receiver had ever been appointed for the Washington Company the statute of limitations would never have run against this action. If it is absurd the defendants have only themselves and the legislature to blame, not the plaintiff, for the defendants are the authors of the fraud and the legislature is the author of the statute which prevents the run-

ning of time until the fraud is discovered by and in behalf of the party injured. Here it could be so discovered in no other way than by a receiver.

The whole argument of the defendants, on pages 46 to 51 of their brief, where they confuse physical power to get into court with the right to sue, is answered by the Michigan case of *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343.

The Fact that the Laws of Nevada Do Not Permit Consolidation of a Corporation of that State with One of Another State Has an Indirect Bearing on the Running of the Statute of Limitations in This Case.

Defendants say, on page 61 of the their brief, "Whether the laws of Nevada * * * forbid * * * the consolidation is not involved in this appeal." In order that there may be a consolidation of corporations there must, of course, be a statute permitting it. There is and has been no such statute in Nevada. What is not permitted is, as to consolidation, prohibited. The laws of Nevada, which in effect prohibit consolidation, are not involved in this case so far as the cause of action is concerned; that depends entirely on the federal anti-trust law. But as to the running of the statute of limitations the matter is different. As to that the law of Nevada is involved. As we have said repeatedly, the only way relief *could* come, under the circumstances, was through action initiated by some creditor of the Washington Company, and it was

only when some creditor should learn that there was no consolidation (because there could not have been a legal or actual consolidation, since it was not permitted by the laws of Nevada) that such creditor would move in the Washington Company's behalf (because such move would be in his own behalf); for when the creditor obtained *that* information he would see that the administration of the affairs of "the Washington-Alaska Bank," commenced in January, 1911, was really the administration of the affairs of the Nevada Company, and not at all the administration of the assets of the Washington Company. The central question is, when the corporation could be affected with notice. That depended on the appointment of a receiver. That in turn depended on initiation of an action by a creditor. That in turn depended on such creditor acquiring knowledge that there had been no consolidation, and that there was therefore as yet no administration of the affairs of the Washington Company. That in turn depended on such creditor acquiring knowledge that the laws of Nevada did not permit such consolidation, and therefore that consolidation could not have occurred. In that way and to that extent the laws of Nevada, not permitting the consolidation, are involved in this appeal. The defendants represented by words and acts that the laws of Nevada permitted the consolidation of the two banks. Not till some one interested as a creditor discovered the falsity of that representation (which was a representation of fact, being matter of for-

eign law) could relief for the Washington Company be expected or, indeed, be possible.

We respectfully submit that the judgment of the lower Court should be reversed.

**HUGHES, McMICKEN, DOVELL & RAMSEY,
de JOURNEL & de JOURNEL,
OTTO B. RUPP,
ROY V. NYE,**

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

VS.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and THE BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of Said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

AUG 12 1916

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M.
SCOTT, a Minor, RUBENA F. SCOTT, a
Minor, and THE BISHOP TRUST COM-
PANY, LIMITED, a Corporation, Guardian
of the Estate of Said WALTER W. SCOTT,
JANET M. SCOTT and RUBENA F.
SCOTT, Minors,

Defendants in Error.

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Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii.

October Term, 1915.

(\$2.00 Stamps.)

BEFORE THE JUSTICES OF SAID COURT.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LTD., a Corporation, Guardian of the Estate of Said WALTER W. SCOTT, JANET M. SCOTT, and RUBENA F. SCOTT, Minors,

Plaintiffs,

vs.

MARY N. LUCAS,

Defendant.

Statement of Case.

SUBMISSION ON CASE AGREED.

To the Honorable the Justices of the Supreme Court of the Territory of Hawaii:

Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, a corporation created and existing under the laws of Hawaii, guardian of the estate of the said Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minors as aforesaid, the plaintiffs herein, and Mary N. Lucas, the defendant herein respectively represent as follows:

1. That they are parties to a question in difference which might be the subject of a civil action or actions in one or more of the Circuit Courts of this Territory,

that they have agreed upon a case or statement containing the facts upon which the controversy between the said parties depends and that they hereby present a submission of the said case, statement and controversy to the Justices [1*] of the above-entitled court for decision and judgment; and that the controversy existing between them as aforesaid is real and that these proceedings are brought and this submission made in good faith to determine the rights of the parties.

2. That one Christian Henry Bertelmann, late of Pilaa, Kauai, died at said Pilaa on or about February 15, 1895, and that at the time of his death he was seized in fee simple of all of those certain pieces or parcels of land and other property described in Exhibit "A" hereunto attached and hereby made a part hereof.

3. That the said Christian Henry Bertelmann left surviving him three sons, Frank Charles Bertelmann, Henry Godfrey Bertelmann, and Christian Sylvester Bertelmann, and six daughters, Catherine Haunani Bertelmann, Justine Ludovica Dorothea Maihui Bertelmann, Mary Josephine Hattie Ke'hukalani Bertelmann and Beatrice Bertelmann.

4. That the said Catherine Haunani Bertelmann, daughter as aforesaid of the said Christian Henry Bertelmann, and who was the wife of one Frank Scott, died on or about September 19, 1905, leaving surviving her three children, the said Walter W. Scott, Janet M. Scott, and Rubena F. Scott, who are plaintiffs herein; that Frank Scott, the husband of

*Page-number appearing at foot of page of original certified Record.

said Catherine Bertelmann Scott and father of the three minors aforesaid died on or about January 13, 1908; and that Susan C. Bertelmann, the widow of said testator, the aforesaid Christian Henry Bertelmann, died on or about September 2, 1915.

5. That on or about May 14, 1908, the plaintiff, the Bishop Trust Company, Limited, was duly appointed guardian of the estate of the three minors aforesaid and is still their duly appointed, qualified and acting guardian as aforesaid.

6. That the said Christian Henry Bertelmann at the time of his death left a will, a copy of which marked Exhibit "B" is hereto attached and is hereby made a part hereof, which said will was duly admitted [2] to probate in the Circuit Court of the Fifth Judicial Circuit on or about April 18, 1895.

7. That on or about March 5, 1910, Henry Godfrey Bertelmann, son as aforesaid of the said Christian Henry Bertelmann, in consideration of Fifteen Thousand (\$15,000.00) Dollars to him paid by the defendant herein, Mary N. Lucas, executed and delivered to the said defendant a deed, a copy of which marked Exhibit "C" is hereto attached and is hereby made a part hereof, which said deed is recorded in the office of the Registrar of Conveyances in Honolulu, Oahu, Territory of Hawaii, in Book 332, on page 16, and which said deed conveys the same lands and other property which are described in Exhibit "A" aforesaid; and that Maggie Bertelmann, wife of said Henry Godfrey Bertelmann, did join in the said deed and did therein release and quitclaim unto the said Mary N. Lucas all of her right and pos-

sibility of dower in the said premises thereby conveyed by her said husband.

8. That on or about September 12, 1907, the said Christian Sylvester Bertelmann, son as aforesaid of the said Christian Henry Bertelmann, and being at the time unmarried, in consideration of Fifteen Thousand (\$15,000.00) Dollars to him paid by the said defendant, executed and delivered to the defendant herein, Mary N. Lucas, a deed, a copy of which marked Exhibit "D" is hereto attached and is hereby made a part hereof, and which said deed is recorded in the office of the said Registrar in book 292, on pages 498 to 500, and which said deed conveys the same lands and other property described in Exhibit "A" aforesaid.

9. That on or about August 3, 1900, the said Frank Charles Bertelmann, son as aforesaid of said Christian Henry Bertelmann, executed and delivered to J. Alfred Magoon of said Honolulu in consideration of the payment to him by said Magoon of the sum of Fifteen Hundred (\$1,500.00) Dollars a mortgage, a copy of which marked Exhibit "E," is hereto attached and is hereby made a part hereof, which said [3] mortgage is recorded in the office of said Registrar in book 213 on pages 222 to 224; and that Mary Bertelmann, wife of said Frank Charles Bertelmann, did join in the said mortgage in this paragraph referred to and did therein release and quitclaim unto the said mortgagee all of her right and possibility of dower in the premises thereby conveyed and mortgaged by her said husband, Frank Charles Bertelmann, that said mortgage was on or about July 11,

1902, by the said J. Alfred Magoon assigned to the defendant herein, Mary N. Lucas, in consideration of the payment by her to him of the sum of One Thousand Nine Hundred Ninety-seven and 45/100 (\$1997.-45) Dollars, which said instrument of assignment is recorded in the office of said Registrar in book 213 on page 223, and which said mortgage conveys and mortgages the same lands and other property described in Exhibit "A" aforesaid.

10. That on or about January 23, 1901, the said Frank Charles Bertelmann in consideration of Three Hundred and Twenty-five (\$325.00) Dollars to him paid by one S. Kobyashi, executed and delivered to said S. Kobyashi, a mortgage, a copy of which marked Exhibit "F" is hereto attached and is hereby made a part hereof, which said mortgage is recorded in the office of the said Registrar in book 215 on pages 456 to 458, and conveys and mortgages the same lands and other property described in Exhibit "A" aforesaid; and that Mary Bertelmann, wife of said Frank Charles Bertelmann, did join in the said mortgage in this paragraph referred to and did therein release and quitclaim unto the said mortgagee all of her right and possibility of dower in the premises thereby conveyed and mortgaged by her said husband, Frank Charles Bertelmann; that said mortgage was on or about August 18, 1902, assigned by said S. Kobyashi to one D. L. Peterson, in consideration of One (\$1.00) Dollar to him paid by said Peterson, and said assignment, a copy of which is hereto attached marked Exhibit "G," and is hereby made a part hereof, is recorded in [4] the office of said Registrar

in book 215 on page 457; that said mortgage was on or about August 28, 1902, assigned by said D. L. Peterson to said Mary N. Lucas, the defendant herein, in consideration of the payment of the full sum then secured by the said mortgage, and said last mentioned assignment, a copy of which is hereto attached marked Exhibit "H" and is hereby made a part hereof, is recorded in the office of the said Registrar in book 215 on page 457.

11. That on or about August 13, 1902, the said Frank Charles Bertelmann, in consideration of Nine *Thousand Eight Hundred and Twenty-five* (\$9,845.-00) Dollars to him paid by the said Mary N. Lucas, the defendant herein, executed and delivered to the said Mary N. Lucas a mortgage, a copy of which marked Exhibit "I" is hereto attached and hereby made a part hereof, which said mortgage is recorded in the office of said Registrar in book 236 on pages 372 to 375, and conveys and mortgages the said lands and other property described in Exhibit "A" aforesaid; and that Mary Bertelmann, wife of said Frank Charles Bertelmann, did join in the said mortgage in this paragraph referred to and did therein release and quitclaim unto the said mortgage all of her right and possibility of dower in the premises thereby conveyed and mortgaged by her said husband, Frank Charles Bertelmann.

12. That none of the mortgages hereinabove mentioned have ever been paid in whole or in part by the mortgagor or released by the said mortgagees or any of them or assigned by the said Mary N. Lucas.

13. That on or about October 30, 1902, the Washington Mercantile Company, a corporation created and existing under the laws of Hawaii, brought its action against the said Frank Charles Bertelmann in the District Court of Honolulu, Oahu, before the District Magistrate of District Court of Honolulu; that the service of the declaration and summons in said action was made upon the defendant therein personally and that after such personal service as aforesaid the said Washington [5] Mercantile Company duly recovered in said action in its favor and against said Frank Charles Bertelmann judgment in the total sum of Eighty and 12/100 (\$80.12) Dollars, and that thereafter execution was duly issued in said action out of said District Court for the satisfaction of said judgment; that said execution was returned wholly unsatisfied and no property, either real or personal, was found by the officer entrusted with the levy of the execution aforesaid upon which he could levy said execution; that thereafter and on or about December 16, 1902, the plaintiff in the said action, after execution had been issued as aforesaid by the said District Magistrate and had been returned wholly unsatisfied and after the officer attempting to levy the same found that there was no property, either real or personal, belonging to the defendant aforesaid in the action within the jurisdiction of the said magistrate, procured a certified copy of the judgment and of the execution aforesaid, together with a certified copy of the return of the officer charged as aforesaid with the duty of

levying the said execution which said writ showed that he could find no property, real or personal, of the defendant in the said action upon which the execution issued by said District Magistrate could be levied, and that he thereby returned the said execution wholly unsatisfied, and docketed the said certified copies of judgment, execution and return aforesaid in the office of the clerk of the Supreme Court of the Territory of Hawaii, and thereupon sued out of said Supreme Court a writ of execution, a copy of which marked Exhibit "J" is hereto attached and hereby made a part hereof, which was duly issued out of said Supreme Court on or about December 16, 1902, for the sum aforesaid of Eighty and 12/100 (\$80.12) Dollars, Two (\$2.00) Dollars cost of execution in said District Court, Forty (\$.40) Cents interest, and Five (\$5.00) Dollars cost of execution in the said Supreme Court, or a total sum of Eighty-seven and 52/100 (\$87.52) Dollars. [6]

14. That upon receipt of the said execution so issued out of the Supreme Court, the Deputy Sheriff of the Territory of Hawaii, who was charged with the duty of levying the same, searched for personal property of the defendant upon which levy could be made but found none.

15. That thereafter and on or about December 31, 1902, the said Deputy Sheriff of the Territory of Hawaii did, under said execution issued by the Supreme Court aforesaid, levy upon all of the right, title and interest of the said Frank Charles Bertelmann, defendant in the action aforesaid, in and to all of the lands and other property described in Exhibit

“A” hereinabove mentioned, and did, for fully thirty (30) days prior to the day of sale hereinafter referred to, post in at least three conspicuous places in the District of Hanalei (Kauai), in which certain of said lands and property are situate, and in at least three conspicuous places in the District of Kawaihau (Kauai), in which the others of the said lands and property are situate, post notices of levy and of sale and did on four different days, the first of which was December 31, 1902, and the last of which was February 6, 1903, publish a notice of sale in the “Hawaiian Star,” a newspaper of general circulation on the Island of Oahu and throughout the Territory of Hawaii, and printed and published at Honolulu in the English language, all of which said notices so posted in the two districts aforesaid and in the newspaper aforesaid described the property to be levied upon and the time and place of sale.

16. That on Saturday, February 7, 1903, at twelve o'clock noon, at the Police Station, Kalakaua Hale, in Honolulu, Oahu, the same being the time and place named in the various notices of sale so posted and published as aforesaid, said Deputy Sheriff of the Territory of Hawaii did offer for sale at public auction all of the right, title and interest of the said Frank Charles Bertelmann in and to all of the lands and other property in said Exhibit “A” described [7] that Mary N. Lucas, the plaintiff herein, bid the sum of Eighty (\$80.00) Dollars, and that the said sum so bid was the highest, last and best bid made at said sale and that at said sale the property so advertised as aforesaid was sold to the said Mary N.

Lucas; that on said seventh day of February, 1903, after said sale, Arthur M. Brown, High Sheriff of the Territory of Hawaii, did execute and deliver to the said Mary N. Lucas a deed, a copy of which marked Exhibit "E" is hereto attached and hereby made a part hereof, conveying and assigning to the said Mary N. Lucas in consideration of the sum of Eighty (\$80.00) Dollars as aforesaid, all the right, title and interest of the said Frank Charles Bertelmann in and to all of the lands and other property described in said Exhibit "A" hereto attached, which said deed is recorded in the office of said Registrar in book 248 on pages 82 to 84.

17. That subsequent to the death of the said Christian Henry Bertelmann, testator as aforesaid, the said Justine Bertelmann who later became Justine Bertelmann Smith, the wife of William J. Smith; Mary Josephine Hattie He'hukalani Bertelmann, who later became Mary Josephine Hattie Bertelmann Bannister, wife of Andrew T. Bannister; Beatrice Bertelmann, who later became Beatrice Bertelmann Ross, the wife of Rideau G. Ross; Mary Angeline Kanikela Bertelmann, who later became Angeline K. Hogan, the wife of Joseph J. Hogan; and Mary Wilhelmine Bertelmann, who later became Wilhelmine B. Baker, the wife of Charles H. Baker, daughters as aforesaid of the said Christian Henry Bertelmann, did sell and convey to the said defendant, Mary N. Lucas, each by a conveyance duly executed, acknowledged, delivered and recorded, and assented to in writing by their respective husbands and each for a valuable consideration all of the right, title, and

interest, estate claim and demand, vested or contingent, then present or prospective, in law or in equity, of them and each of them in and to all of the lands and property described in Exhibit "A" aforesaid; and that the said Mary N. Lucas, defendant as aforesaid, [8] has not in any way alienated or parted with any part of the lands, rights or other property so conveyed to her by the said five daughters of the said testator as aforesaid or by any of them or any interest therein, but is still the holder and owner of all of said lands and property so conveyed by all of the said five daughters and each of them and every part thereof. Copies of the five conveyances in this paragraph referred to, so made as aforesaid by the five daughters in this paragraph mentioned, are hereto attached, marked respectively Exhibits "L," "M," "N," "O," and "P," and are hereby made parts hereof.

18. That by indenture dated November 1, 1890, and recorded in the office of the said Registrar in book 128 on pages 205 to 208, the said Christian Henry Bertelmann demised and leased to the Kilauea Sugar Company, a corporation created and existing under the laws of Hawaii, all of the same lands and other property described in Exhibit "A" aforesaid "for and during the term of Twenty-five (25) years from the first day of November, A. D. 1890, fully to be complete and ended"; that the said demise and lease was not at any time or in any way revoked, cancelled or surrendered, and that its term of twenty-five (25) years therein prescribed as aforesaid was not at any

time or in any way shortened, but that on the contrary as to all of the lands and other property thereby demised and leased, the said demise and lease continued in full force and effect for the full term for and during which it was, by its own terms, to continue in force and effect, and that the said lease for this paragraph mentioned is the same lease for twenty-five (25) years referred to in said will of Christian Henry Bertelmann and in said will variously described as "Agreement and Lease of all my lands * * * made by myself with the Kilauea Sugar Company, Limited, for the term of 25 years" and "twenty-five years' lease to the Kilauea Sugar Company."

19. The questions at issue between the said Walter W. Scott, [9] Janet M. Scott, and Rubena F. Scott, plaintiffs herein as aforesaid, on the one hand, and Mary N. Lucas, the defendant herein, on the other hand are the following:

(a) Under the terms of the will aforesaid of the said Christian Henry Bertelmann, and particularly under the terms of the paragraph or article thereof marked "Third," are the said three minor children of Catherine Haunani Scott entitled to receive from the said Mary N. Lucas, grantee and assignee as aforesaid of the three sons aforesaid of the said Christian Henry Bertelmann, the sum of Five Thousand (\$5,000.00) Dollars which their mother would have been entitled to receive from the said three sons or their grantee and assignee had she survived the expiration of the twenty-five (25) year lease made by the said Christian Henry Bertelmann to the Kilauea

Sugar Company and referred to in the said will of the said Christian Henry Bertelmann?

(b) Did the fact of the death of the said Catherine Haunani Scott, before the expiration of said twenty-five (25) year lease, although she survived the testator, remove and terminate any right which said Catherine Haunani Scott might otherwise have had to receive said sum of Five Thousand (\$5,000.00) Dollars and any duty which the three sons aforesaid of the said Christian Henry Bertelmann or their grantee and assignee might otherwise be under to pay said sum of Five Thousand (\$5,000.00) Dollars, in other words,

(c) Were the right and the duty mentioned in paragraphs "a" and "b" hereof made contingent upon the survival of each of the daughters, including the said Catherine Haunani Scott, until and at the expiration of the said twenty-five (25) year lease or were they contingent upon the survival of each of the daughters, including the said Catherine Haunani Scott, merely until and at the death of the testator aforesaid?

(d) Have the said Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minor children as aforesaid of the said Catherine Haunani Scott, now any right, title, interest, estate, claim or demand in or [10] to any of the lands of the said testator referred to in paragraph or article marked "Third" in his said will or in or to any sum or payment of Five Thousand (\$5,000.00) Dollars referred to or provided for in said paragraph or article marked "Third" in said will?

And, if so, what right, title, interest, estate, claim or demand have they and each of them in and to said lands or (and) in and to said sum or payment of Five Thousand (\$5,000.00) Dollars.

(e) In order that the said Mary N. Lucas, the defendant herein, may be the undisputed owner, i. e., the owner in fee simple absolute and indefeasible, of all of the lands of the said testator referred to in said paragraph or article marked "Third," is it necessary for her to pay to the said three minor children of said Catherine Haunani Scott the sum of Five Thousand (\$5,000.00) Dollars or any other sum or is she now such undisputable owner without making any payment of said sum or any other sum to the said three minors or any of them?

20. The parties hereto do hereby stipulate that if the decision of the court shall be that the three children aforesaid of the said Catherine Haunani Scott have, and each of them has, now no right, title, interest, estate, claim or demand in or to the said lands of the said testator referred to in said paragraph or article marked "Third" in the will or in or to any payment or sum of Five Thousand (\$5,000.00) Dollars, final judgment be entered herein, in substance and as nearly as may be in form as though this were an action to quiet title, declaring that the said three minor children have not, nor have any of them, any right, title, interest, estate, claim or demand in or to the said lands in this paragraph mentioned or any of them or in or to any payment or sum of Five Thousand (\$5,000.00) Dollars under said paragraph or article marked "Third" in the said will or under

any other provision of the said will, and that as against the said three minors the said defendant, Mary N. Lucas, is now the undisputable owner of all of the said lands of said testator, and every part thereof, set [11] forth in said Exhibit "A," and is the owner thereof in fee simple, absolute and indefeasible.

21. The parties hereto do hereby further stipulate that if, on the other hand, the decision of the court shall be that the three children aforesaid of the said Catherine Haunani Scott have now in the aggregate a one-ninth undivided interest in the lands and other property in said Exhibit "A" described and that in order that the said defendant may become the undisputable owner of all of the said lands and property, it is necessary under the said paragraph or article marked "Third," in the said will of the said Christian Henry Bertelmann to pay to the three minors aforesaid in the aggregate the sum of Five Thousand (\$5,000.00) Dollars, final judgment be entered herein, in substance and as nearly as may be in form as though this were an action to quiet title, declaring that the said three minors have in the aggregate an undivided one-ninth interest in the said lands and property subject to be defeated by and upon the payment to them by said Mary N. Lucas, her heirs or assigns, before November 1, 1916, of the sum of Five Thousand (\$5,000.00) Dollars, and that they are entitled to receive from the said Mary N. Lucas, before the said interest of said minors can be wiped out, the aggregate sum of Five Thousand (\$5,000.00) Dollars; and further declaring that as

against the said minors the said defendant herein is the owner of an undivided eight-ninths interest in all of the said lands and other property and of the right to acquire the one-ninth interest outstanding as aforesaid in the said three minors by paying to them at any time prior to November 1, 1916, the said sum of Five Thousand (\$5,000.00) Dollars.

22. It is further stipulated by the parties herein that it is their desire that if the court shall be of the opinion that some material fact, or facts, which is or are necessary to a decision herein is not agreed upon or recited herein or that in some other respect in matter of form this submission is defective, the parties herein shall [12] be given an opportunity to amend this submission so as to correct any defect that may be so found herein by the Court and in order that this submission shall not be dismissed by reason of any such imperfection of form.

Dated, Honolulu, T. H., February 4, 1916.

Respectfully submitted,

WALTER W. SCOTT, a Minor,

JANET M. SCOTT, a Minor,

RUBENA F. SCOTT, a Minor,

By BISHOP TRUST CO., LIMITED, [Seal]

(Sgd.) JAS. L. COCKBURN,

Its Secretary,

(Sgd.) WILLARD E. BROWN,

Its Treasurer,

Guardian of the Property of said Minors.

(Sgd.) MARY N. LUCAS.

Territory of Hawaii,
City and County of Honolulu,—ss.

Antonio Perry, being first duly sworn, on oath deposes and says: That he is the attorney for Mary N. Lucas, the defendant herein; that for three months and more last past he has transacted the business of the said defendant, with reference to the matters in this submission referred to, with the representatives of the said three [13] minor children of the said Catherine Haunani Scott; that the controversy herein submitted to the Court for determination is real; and that these proceedings are brought in good faith to determine the respective rights of the parties herein; and that he makes this affidavit of his own knowledge.

(Signed) ANTONIO PERRY.

Subscribed and sworn to before me this 4th day of February, 1916.

[Notarial Seal]

(Signed) CATHERINE M. CLARK,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [14]

**Exhibit "A" to Agreed Statement of Facts —Copy
of Schedule of Properties Belonging to Christian
Henry Bertelmann.**

All of the following tracts and parcels of land and other property situated on the Island of Kauai, to wit:

1. The Ahupuaa of Kahili containing an area of 1789 acres more or less; being the same premises

described in Royal Patent — Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann, late of Pilaa, Kauai, now deceased, by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86 folios 220.

2. The Ahupuaa of West Waiakalua containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Henry Bertelmann by said deed.

3. The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5, 1878, of record in the Hawaiian Registry of Deeds in Liber 53 folio 284.

4. All of that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less; being the same premises conveyed to said Christian Henry Bertelmann by deed of Wm. Worner, dated March 31, 1883, of record in the Hawaiian Registry of Deeds in Liber 79 folio 386-387.

5. Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6. All kuleanas belonging to the said Christian Henry Bertelmann situated within or adjacent to the boundaries of any of the above described premises and all other parcels and tracts of land upon

the Island of Kauai owned by the said Christian Henry Bertelmann at [15] the time of his death.

7. All streams of water and water rights upon or appurtenant to all and singular the above mentioned premises.

8. All leases of any portion of said premises made by Christian Henry Bertelmann together with all rents, remainders, and reversions of the same. [16]

Exhibit "B" to Agreed Statement of Facts—Copy of Will of Christian Henry Bertelmann.

Know all men by these presents, that I, Christian Henry Bertelmann of Pilaa, Island of Kauai, Hawaiian Islands, being of sound mind and memory; do make, publish and declare my last will and testament in manner following.

First. In consideration of agreement and lease of all my lands (except 100 acres actually fenced off and two acres of taro land at Kahili) made by myself with the Kilauea Sugar Co. for the term of twenty-five years commencing November 1st 1890 and ending Nov. 1st, 1915; at the rate of six thousand Dollars (\$6,000.00) per annum, payable quarterly in advance; I make the following arrangements.

I give, divide and bequeath said rents as follows:

1° To my lawful wife Susan C. Bertelmann a life rent of two thousand Dollars (\$2,000.00) yearly; payable quarterly; being one-third of the above mentioned rent of \$6000.00, or in case of any possible change in the actual agreement with the Kilauea Sugar Co., an equivalent of one-third of all net receipts or income of the lands now rented to the Kilauea Sugar Co. In case of Susan C. Bertelmann

death the above mentioned income of \$2000.00 a year, or equivalent of one third as her distributive share of Dower would be equally divided amongst my children or surviving children.

2° To each and every one of my children or surviving children an equal share of the four thousand Dollars (\$4000.00) or the remaining two thirds of the total income deriving from the rent of my lands to the Kilauea Sugar Co. or equivalent thereof.

Second. I further direct that the 100 acres reserved by me according to agreement with the Kilauea Sugar Co. and actually fenced in, forming at present my homestead, shall be divided into 10 lots and shall be distributed in the following manner:

1° To my wife Susan C. Bertelmann lot No. 1, described hereafter as figure ABCba (line AB 1400 ft. BC 850 ft. Cb 690 ft. aA 22 ft. on gov. road.); including all buildings, improvements and [17] appartenances thereupon along with all chattels and furnitures except those furnitures; already disposed off by any previous arrangements in favor of any of my children. Said Susan C. Bertelmann to have, to hold and to dispose of said premises and appartenances thereupon for her own private and personal use, with the expressed condition that she shall not sell, convey nor dispose of the whole nor any part of the same in favor of any one outside of my own family. It is also my sincere wish and desire not my will; that in case *of* my wife should like to dispose of these premises; whether during her life time or by special will after her death, she would give the preference to my eldest son Franz Charles Bertel-

mann, provided she would have no special reason, to give or to convey the same or any part of it, in favor of any one of my other children.

2° To my son Franz Charles Bertelmann I give, devise and bequeath that parcel of land along side of his mother's, described hereafter as lot No. 2. (figure abcd—bc 135 fT, mauga.—ad 223 ft. al. gov. road.)

3° To my son Henry Godfrey Bertelmann; I give, devise and bequeath that piece of land along side lot No. 2, and described as lot No. 3 hereafter (by figure d c f e—cf 135 ft. mauka—dc 223 ft. al. gov. road.)

4° To my daughter Catherine Haunani Bertelmann: I give, devise and bequeath that parcel of land along side No. 3 and described hereafter as lot No. 4 (by figure e f g h.—fg 135 ft. mauka—eh 223 ft. al. gov. road)

5° To Justine Ludovica Dorothea Maihui Bertelmann my daughter: I give, devise and bequeath that parcel of land along side No. 4 and described hereafter as lot No. 5 (by figure hgji—line gj 135 ft. mauka—hi 223 ft. al. gov. road)

6° To Mary Angeline Kanikela Bertelmann my daughter: I give, devise and bequeath that parcel of land along side No. 5 and described hereafter as lot No. 6 (by figure ijkl—line jk 135 ft. mauka il 223 ft. al. gov. road) [18]

7° To my daughter: Mary Wilhelmina Bertelmann: I give, devise and bequeath that parcel of land along side No. 6 and hereafter described as lot No. 7 (by figure lknm—line kn 135 ft. mauka lm 223 ft. al. gov. road)

8° To my daughter: Mary Josephine Hattie Ke' hukalani Bertelmann: I give, devise and bequeath that parcel of land along side No. 7 and described hereafter as lot No. 8 (by figure mnog-line no 135 ft. mauka-mg 223 ft. al. gov. road.

9° To my daughter: Beatrice Bertelmann I give devise and bequeath that parcell of land along side No. 8 and hereafter described as lot No. 9 (by figure gopr.-line op 135 ft. mauka-gr 223 ft. alo. gov. road)

10° To my son: Christian Sylvester Bertelmann, I give, devise and bequeath that parcell of land along side lot No. 9 and described hereafter as lot No. 10 by figure pDEr-line pD 136 ft. mauka-rE 226 ft. al. gov. road.

I hereby also direct that not one of these above mentioned lots, shall ever be conveyed, sold or in any other way disposed off outside of my own family as long as there will be one or more legal offsprings of C. Bertelmann's family.

Third. At the expiration of the 25 years lease with the Kilauea Sugar Co. it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons Frank Charles, Henry Godfrey and Christian Sylvester Bertelmann, or then surviving sons or son. Provided however that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand dollars \$5000.00 In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the

\$5000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying: [19]

1° to each of my daughters or surviving daughters the amount aforesaid of \$5000.00

2° to my shortcoming son or sons the same amount of \$500.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above mentioned conditions.

3° To my wife Susan Bertelmann a life rent of \$2000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate.

Fourth. Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to circumstances and best advantage of my family. The money deriving from said sale or lease will be equally divided amongst my children or their lawful heirs and assigns after the distributive share of dower will have been given to my wife Susan Bertelmann according to law.

Fifth. I nominate and appoint my friends Rev. Sylvester of Honolulu and Albert S. Wilcox of Kauai to be executors of this my will, for the purpose of paying my debts if any they to act without bond.

Sixth. It is further my wish and will that Rev. Sylvester of Honolulu shall be appointed guardian of

my minor children and receive directly all income belonging to the Estate by him to be distributed according to my will, to all and every member of my family, giving each one his share quarterly.

Seventh. All horses and cattle branded C. B. or S. B. lawfully belonging to me shall be remitted to my wife Susan C. Bertelmann. I hereby also grant, bequeath and devise to my wife, that Kuleana of two acres of taro land situated at Kahili, Kauai and specially reserved by me as per agreement in the lease with Kilauea Sugar [20] Co. for her to hold, to possess and to dispose off according to her own wish and will.

In witness whereof I said Christian H. Bertelmann have hereunto set my hand and seal this twelfth (12th) day of December A. D. Eighteen Hundred ninety one.

(Signed)

CHRISTIAN H. BERTELMANN. [Seal]

Signed, sealed, published and declared by the said Christian H. Bertelmann as and for his last will and testament in our presence, who at his request, in his presence and in the presence of each other and in the same room have hereunto set our names as Witness thereto:

(Signed) CHAS. KOELLING,

“ EMMERAN SCHULTE.

Know all men by these presents that I Susan Bertelmann in consideration of one Dollars to me paid, the receipt whereof is hereby acknowledged, do hereby promise, covenant and agree to and with

my husband Christian H. Bertelmann that I will accept the provisions made for me in the above will in heir of Dower and my distributive share given to me by law in the Estate of my husband.

Witness my hand and seal this twelfth (12th) day of December, A. D. 1891.

(Signed)

SUSAN BERTELMANN. [Seal]

In presence of:

(Signed) CHAS. KOELLING,

“ EMMERAN SCHULTE. [21]

**Exhibit “C” to Agreed Statement of Facts—Deed,
March 5, 1910, Bertelmann to Lucas.**

Know all men by these presents, that I Henry Godfrey Bertelmann, of Honolulu, Island of Oahu, Territory of Hawaii, in consideration of Fifteen Thousand Dollars, (\$15,000.00) to me paid by Mary N. Lucas, wife of Charles Lucas, of said Honolulu, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey all of my right, title, interest and estate, claim and demand, vested or contingent, present or prospective, in law or in equity, in and to the following tracts and parcels of land situate on the Island of Kauai, Territory of Hawaii, viz. :—

1st:—The Ahupuaa of Kahili, containing an area of 1,789 acres more or less, being the same premises described in Royal Patent —, Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in

the Hawaiian Registry of Deeds in Liber 86, folio 220.

2nd:—The Ahupuaa of West Waiakalua, containing an area of 332-40/100 acres more or less, being premises also conveyed to said Christian Bertelmann by said deed.

3rd:—The Ahupuaa of Pilaa, containing an area of 1,520 acres more or less, being the same premises described in Land Commission Award 8559 B to W. C. Lunalilo, and conveyed to said Christian Bertelmann by deed of J. Mott Smith et al., dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4th:—All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less, being the same premises conveyed to said Christian Bertelmann by deed of Wm. Wörner, dated March 31st, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folios 386–387.
[22]

5th:—Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6th:—All kuleanas situated within or adjacent to the boundaries of any of the above described premises, and all other parcels and tracts of land upon the Island of Kauai heretofore owned by Christian Bertelmann.

7th:—All streams of water and water rights upon or appurtenant to all and singular the above mentioned premises.

8th:—All leases of any portion of said premises made by the said Christian Bertelmann together with all rents, remainders and reversions of the same.

And being the same premises leased by Christian Bertelmann to the Kilauea Sugar Company, a corporation, by lease dated November 1, A. D. 1890, and devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's Office of the Supreme Court of the Territory of Hawaii.

9th:—All that piece or parcel of land situate at Pilaa, Island of Kauai, Territory of Hawaii, devised to me by the will of Christian Henry Bertelmann, dated the 12th day of December, 1891, and now on file in the Clerk's Office of the Supreme Court of the Territory of Hawaii, and known as Lot Number Ten (10) of the map attached to said will.

To have and to hold all said right, title, interest and estate, claim and demand in said premises with all the rights, privileges and appurtenances thereto belonging to the said Mary N. Lucas and her heirs and assigns forever.

And I hereby for myself and my heirs, executors and administrators, covenant with the said Mary N. Lucas and her heirs and assigns, that I am lawfully seized in fee simple of the granted premises; that they are free from all incumbrances, [23] save and except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann, dated November 1, 1890, at an annual rental of Six Thousand Dollars (\$6,000.00); that I will and my heirs, executors and administrators shall warrant and defend the

same to the said Mary N. Lucas, and her heirs and assigns forever against the lawful claims and demands of all persons save under said lease.

And for the consideration aforesaid, I do hereby assign and set over unto the said Mary N. Lucas, and her heirs and assigns forever, all my right, title, interest, share and proportion of, in and to any and all rents due or to become due under the aforesaid lease to said Kilauea Sugar Company, or any other and all leases of said premises or any portion thereof.

And for the consideration aforesaid, I do hereby sell, assign and transfer to said Mary N. Lucas, her heirs and assigns forever, all and every the rights, powers and privileges given and granted to me by the will of my said father, Christian Henry Bertelmann, and particularly by paragraph "Third" thereof.

And for the consideration aforesaid, I, Maggie Bertelmann, wife of the said Henry Godfrey Bertelmann, do hereby release and quit-claim unto the said Mary N. Lucas, and her heirs and assigns forever, all my dower and right of dower, in and to all of the premises and property herein described.

In Witness Whereof, the said Henry Godfrey Bertelmann, and Maggie Bertelmann, have hereunto set their hands and seals this 5th day of March, A. D. 1910.

(Sgd.) HENRY GODFREY BERTELMANN.

“ MAGGIE BERTELMANN.

Executed in presence of:

(Sgd.) C. W. ASHFORD.

City and County of Honolulu,
Territory of Hawaii,—ss.

On this fifth day of March A. D. 1910, before me personally appeared Henry Godfrey Bertelmann and Maggie Bertelmann, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Signed) R. R. REIDFORD,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [25]

[Endorsed]: (Copy.) Deed. Dated March 5, 1910. Henry Godfrey Bertelmann to Mary N. Lucas. Recorded in Book 332, pp. 16-18, March 7, 1910, at 12:05 o'clock P. M. and compared. (S) Charles H. Merriam, Registrar of Conveyances. [26]

**Exhibit "D" to Agreed Statement of Facts—Deed,
September 12, 1907, Bertelmann to Lucas.**

12 Documentary stamps of the Territory of Hawaii
@ \$5.00—\$60.00.

KNOW ALL MEN BY THESE PRESENTS:
That I, CHRISTIAN SYLVESTER BERTELMANN, of Honolulu, Island of Oahu, Territory of Hawaii, in consideration of Fifteen Thousand Dollars (\$15,000.00) to me paid by MARY N. LUCAS, wife of Charles Lucas, of said Honolulu, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey all of my right, title, interest and estate, claim and demand, vested or contingent, present or prospective, in law or in equity, in and to

the following tracts and parcels of land situate on the Island of Kauai, Territory of Hawaii, viz:—

1st: The Ahupuaa of Kahili containing an area of 1,789 acres more or less, being the same premises described in Royal Patent —, Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folio 220.

2nd: The Abupuaa of West Waiakalua, containing an area of 332-40/100 acres more or less, being premises also conveyed to said Christian Bertelmann by said deed.

3rd: The Ahupuaa of Pilaa containing an area of 1,520 acres more or less, being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to said Christian Bertelmann by deed of J. Mott Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Libr 53, folio 284.

4th: All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less, being the same premises conveyed to said Christian Bertelmann [27] by deed of Wm. Worner, dated March 31st, 1883, of record in the Hawaiian Registry of Deeds in Libr, 79, folios 386-387.

5th: Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6th: All kuleanas situated within or adjacent to the boundaries of any of the above described premises, and all other parcels and tracts of land upon the Island of Kauai heretofore owned by Christian Bertelmann.

7th: All streams of water and water rights upon or appurtenances to all and singular the above mentioned premises.

8th: All leases of any portion of said premises made by the said Christian Bertelmann together with all rents, remainders and reversions of the same.

And being the same premises leased by Christian Bertelmann to the Kilauea Sugar Company, a Corporation, by lease dated November 1, A. D. 1890, and devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii.

9th: All that piece or parcel of land situate at Pilaa, Island of Kauai, Territory of Hawaii, devised to me by the will of Christian Henry Bertelmann, dated the 12th day of December, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii, and known as Lot Number Ten (10) of the map attached to said will.

TO HAVE AND TO HOLD all said right, title, interest and estate, claim and demand in said premises with all the rights, privileges and appurtenances thereto belonging to the said MARY N. LUCAS, and her heirs and assigns forever.

AND I hereby for myself and my heirs, executors and administrators covenant with the said MARY

N. LUCAS and her [28] heirs and assigns, that I am lawfully seized in fee simply of the granted premises; that they are free from all incumbrances, save and except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann, dated November 1, 1890, at an annual rental of Six Thousand Dollars (\$6,000.00); that I will, and my heirs, executors and administrators shall warrant and defend the same to the said MARY N. LUCAS and her heirs and assigns forever against the lawful claims and demands of all persons save under said lease.

AND for the consideration aforesaid, I do hereby transfer assign and set over unto the said MARY N. LUCAS and her heirs and assigns forever, all my right, title, interest, share and proportion of, in and to any and all rents due or to become due under the aforesaid lease to said Kilauea Sugar Company, or any other and all leases of said premises or any portion thereof.

AND for the consideration aforesaid, I do hereby sell, assign and transfer to said MARY N. LUCAS, and her heirs and assigns forever, all and every the rights, powers and privileges given and granted to me by the will of my said father, Christian Henry Bertelmann, and particularly by paragraph "Third" thereof.

IN WITNESS WHEREOF, I, the said CHRISTIAN SYLVESTER BERTELMANN, hereunto set

my hand and seal this 12th day of SEPTEMBER,
A. D. 1907.

(Signed) CHRISTIAN SYLVESTER
BERTELMANN.

Executed in presence of:

WILLIAM SAVIDGE.

Territory of Hawaii,
County of Oahu,
City of Honolulu,—ss.

On this Thirteenth day of September, A. D. 1907,
personally appeared before me Christian Sylvester
Bertelmann, known to me to be the person described
in and who executed the foregoing instrument, who
acknowledged to me that he executed the same freely
and voluntarily and for the uses and purposes there-
in set forth.

[Notarial Seal] (Sgd.) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory
of Hawaii. [29]

[Endorsed]: W. S. 2944—11:55. Deed. Christian
Sylvester Bertelmann to Mary N. Lucas. Dated:
September 12th, 1907. Indexed: Register Office
Oahu—ss: Received for record this 14th day of Sep-
tember A. D. 1907 at 11:55 o'clock A. M. and recorded
in Liber 292 on pages 498—500 and Compared. (S)
Chas. H. Merriam, Registrar of Conveyances. By
....., Deputy Registrar.

Recording Fees \$5.

60 [30]

X

Exhibit "E" to Agreed Statement of Facts—Mortgage, August 3, 1900, Bertelmann to Magoon, etc.

U. S. Revenue Stamp of 1900—25¢.

3 Territorial Stamps \$1.00—\$3.00.

THIS INDENTURE made this 3d day of August A. D. 1900, between FRANZ CHARLES BERTELMANN of Pilaa, Kauai, of the first part MORTGAGOR and J. ALFRED MAGOON of Honolulu, Island of Oahu, Territory of Hawaii, of the second part MORTGAGEE, WITNESSETH:

THAT the said party of the first part in consideration of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1500.00) to him paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell and convey unto said party of second part ALL the lands and premises belonging to him the said party of the first part situate in said Island of Kauai, including all the right, title and interest of the said party of the first part and all the lands, premises, tenements, hereditaments and rights devised to him by his father's will duly admitted to probate on the 18th day of April 1895 and appearing on record of Probate under Number 423 on the Records of Probate on the Island of Kauai.

To have and to hold the same with all the rights, privileges, issues, rents, profits, appurtenances and easements unto said J. Alfred Magoon, his heirs and assigns to his and their use and behoof forever.

This conveyance being intended as a mortgage to

secure the repayment of said sum of ONE THOUSAND FIVE HUNDRED Dollars (\$1500.00) in SIX Years from date with interest at the rate of TEN per cent per annum net above all taxes and all other charges payable semiannually according to the promissory note of the said Mortgagor, whereby he promises to pay said principal and interest with same aforesaid.

And it is agreed that the said Mortgagee is *sole* authorized [31] and empowered to take, collect and receive all the share of the Mortgagor of the rents due or that may accrue due under that certain indenture of lease from C. Bertelmann to the Kilauea Sugar Company dated November 1st 1890, and after deducting all costs and charges with reference to the same he shall apply the net proceed to the payment first to the said interest and second to the said payment of said principal and it is agreed that said mortgagor shall have the right of paying all the said principal at any due date of interest and shall be entitled to a cancellation hereof and it is hereby further agreed that said FRANZ CHARLES BERTELMANN will insure his life in some life insurance company to be designated by the Mortgagor for a sum not less than \$2000.00 and will not do any act or thing to forfeit said insurance and will keep the premiums at all times paid and will assign said policy to said Mortgagee as security for the payment of the said principal and interest.

BUT in case said Mortgagor shall suffer a breach of the foregoing condition or any agreement herein contained, said Mortgagor's debt and note shall be-

come immediately due and payable and upon such breach or default said Mortgagee, his executors, administrators and assigns are hereby irrevocably authorized and empowered to foreclose this mortgage and may thereupon sell said premises and property at public auction in Honolulu without suit and decree of sale with all improvements and may make and execute all proper deeds therefor and may become purchasers at such sale, and such sale shall forever bar the said Mortgagor and all persons claiming under him from all right in said property and out of the proceeds may retain a counsel fee and all costs of sale and all sums then secured hereby, whether then or thereafter payable.

IN and for the aforesaid consideration, I MARY BERTELMANN, wife of said FRANZ CHARLES BERTELMANN do hereby release and quitclaim unto said Mortgagee and his heirs and assigns forever [32] all my dower and right of dower in said premises and property.

IN WITNESS WHEREOF, the said FRANZ CHARLES BERTELMANN and MARY BERTELMANN have hereunto set their hands and seals the day and year first above written.

(Signed) FRANK C. BERTELMANN.

“ MARY BERTELMANN.

IN PRESENCE OF:

.....

Territory of Hawaii,
Island of Oahu,—ss.

On this 3d day of August, A. D. 1900, personally appeared before me FRANK C. BERTELMANN

and MARY BERTELMANN, his wife, known to be *to be* the persons described in and who executed the foregoing instrument and they acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth. And said MARY BERTELMANN, on an examination separate and apart from her husband acknowledged to me that she executed the same freely, without fear or compulsion of her said husband.

[Notarial Seal]

(Signed) ALEX. ST. M. MACKINTOSH,
Notary Public, First Jud. Circuit. [33]

Territorial Stamp—\$1.00.

In consideration of \$1997.45, to me, the within named mortgagee, paid by Mary Lucas, wife of Charles Lucas, of Honolulu, Island of Oahu, Territory of Hawaii, being the *dull* amount due to me of principal and interest and charges on the within mortgage, the receipt whereof is hereby acknowledged, I do hereby sell, assign, transfer and set over unto said Mary Lucas all my right, title and interest in and to the said mortgage, and all my right, title and interest thereunder to the property therein described, and the note and claim thereby secured.

Dated Honolulu, July 11th, 1902.

(Signed) J. ALFRED MAGOON.

Territory of Hawaii,
Island of Oahu,—ss.

On this twenty-eighth day of July, A. D. 1902, personally appeared before me J. Alfred Magoon, known to me to be the person described in and who executed the foregoing instrument, who duly ac-

knowledge to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Notarial Seal]

(Signed) P. DANSON KELLETT, Jr.,
Notary Public, First Judicial Circuit. [34]

[Endorsed]: C. Lucas 5042-12:20. Indexed. Register Office Oahu,—ss. Received for record this 28th day of July, A. D. 1902 at 12:20 o'clock P. M. and Recorded in Liber 213 on Page 223. And Compared. (S) Thos. G. Thrum, Registrar of Conveyances. By ————, Deputy Registrar.

Recording Fees \$1-Pd.

Pd. 1.-1. 2.

J. A. M. 6036-1:52. Mortgage. Franz Charles Bertelmann to J. Alfred Magoon. Dated: August 3d, 1900. Assigned to Mary N. Lucas, July 11, 1902. Indexed. Register Office Oahu,—ss. Received for Record this 25th day of September A. D. 1900 at 1:52 O'clock P. M. and Recorded in Liber 213 on Pages 222, 223 and 224. And Compared. (S) Thos. G. Thrum, Registrar of Conveyances. By ————, Deputy Registrar.

Recording Fees, \$4.50.

3 x

**Exhibit "F" to Agreed Statement of Facts—
Mortgage, January 23, 1901, Bertelmann to
Kobayashi.**

Territorial Stamp—\$1.00.

Know all men by these presents that I, Frank C. Bertelmann, of Honolulu, Oahu, Mortgagor, in con-

sideration of the sum of Three Hundred and Twenty-five Dollars to me paid by S. Kobyashi, of said Honolulu, Mortgagee, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto said Mortgagee and his heirs and assigns forever, all of my one-third undivided interest in and to all of those certain parcels of land situate on the Island of Kauai, viz:

1. The Ahupuaa of Kahili, described in R. P. — L. C. A. 8559B to W. C. Lunalilo, containing an area of 1789 acres.

2. The Ahupuaa of West Waiakalua containing an area of 322.40 acres.

3. The Ahupuaa of Pilaa, described in L. C. A. 8559B to W. C. Lunalilo containing an area of 1520 acres (excepting however therefrom 100 acres reserved for a homestead).

4. Land at Lepeula, Koolau, Kauai, containing 102 acres, being the same conveyed to C. Bertelmann by deed dated March 31, 1883, recorded in Liber 79, page 386.

5. Five shares in the Hui of Moloaa.

And also all of my right, title and interest in and to all rents now or hereafter to become due for any portions of the lands above described.

And I do hereby for myself and my heirs executors and administrators covenant with said Mortgagee and his heirs and assigns that I am lawfully seized in fee simple of said granted premises; that the same are free of all incumbrances; that I will and my heirs, executors and administrators shall warrant and defend the same unto said Mortgagee and his

heirs and assigns forever against the lawful claims and demands of all persons; that I will pay to said Mortgagee or order the [35] sum of \$325.00 in One Month from date with interest thereon from date until paid at the rate of Nine per cent per annum, payable monthly, and will pay all taxes and Government charges on the property above granted and also the expense of release of this mortgage.

In case I shall pay said note and interest at the times aforesaid and shall perform all of the covenants and agreements herein then this deed and said note shall be void.

In case I shall fail to pay said note and interest at the times aforesaid or in case of a breach of any of the covenants or conditions herein, the said Mortgagee, his heirs or assigns may foreclose this mortgage and sell said granted premises or any part thereof as provided by law and may convey the property so sold to the purchaser thereof in fee simple, either in his or their own name or names or as my attorney in fact for that purpose hereby irrevocably constituted and appointed and out of the proceeds of sale shall retain all sums hereby secured including expense of foreclosure and sale and an attorney's fee, rendering the surplus to me or my heirs or assigns.

And for the consideration aforesaid I, Mary Bertelman, wife of said Mortgagor, hereby release unto said Mortgagee and his heirs and assigns forever all of my right of dower in and to said granted premises.

Witness our hands and seals this 23d day of January, 1901.

(Signed) F. C. BERTELMANN.

“ MARY BERTELMANN. [36]

Territory of Hawaii,
Island of Oahu,—ss.

On this 23d day of January, A. D. 1901, personally appeared before me Frank C. Bertelmann and Mary Bertelmann, his wife, known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth. And said Mary Bertelmann, on a private examination by me, separate and apart from her husband, further acknowledged to me that she executed the same freely and without any fear, compulsion or constraint from her said husband.

[Notarial Seal] (Sgd.) R. C. A. PETERSON,
Notary Public.

Territorial Stamp—\$1.00.

**Exhibit "G" to Agreed Statement of Facts—
Assignment of Mortgage, August 18, 1902,
Kobayashi to Peterson.**

In consideration One Dollar to me paid by D. L. Peterson, of Honolulu, Oahu, I hereby assign, transfer and set over to D. L. Peterson and his heirs, representatives and assigns forever the within mortgage, the note and debt thereby secured, and all of my right, title and interest in and to the premises and property therein mentioned.

Dated Honolulu, August 18, 1902.

(Signed) S. KOBAYASHI.

Territory of Hawaii,
Island of Oahu,—ss.

On this 18th day of August, A. D. 1902, personally appeared before me S. Kobayashi, known to me to be the person described in and who executed the foregoing assignment of mortgage, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein set forth.

[Notarial Seal]

(Signed) CHARLES F. PETERSON,
Notary Public.

[Endorsed]: C. F. Peterson. 7573-1:46. Mortgage. Frank C. Bertelmann & Wife to S. Kobayashi. Dated January 23, 1901. \$325. One Month, 9%. Indexed. Register Office Oahu,—ss. Received for Record this 24th day of January, A. D. 1901, at 1:46 o'clock P. M., and recorded in Liber 215 on pages 456-458. And Compared. (S) Thos. G. Thrum. Registrar of Conveyances. By ———, Deputy Registrar.

Recording Fees \$4.

1

X [37]

**Exhibit "H" to Agreed Statement of Facts—
Assignment of Mortgage, August 28, 1902,
Peterson to Lucas.**

Territorial Stamp—\$1.00.

In consideration of the payment to me of the full sum secured by the within mortgage I do hereby as-

sign, transfer and set over to Mrs. Mary Lucas of Honolulu, Oahu, and her representatives and assigns forever the within mortgage, the note and debt thereby secured and all of my right, title and interest in the property therein described by reason of said mortgage.

Dated Honolulu, August 28, 1902.

(Signed) DAVID L. PETERSON.

Territory of Hawaii,
Island of Oahu,—ss.

On this 3d day of September, A. D. 1902, personally appeared before me, David L. Peterson, known to me to be the party described in and who executed the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

[Notarial Seal] (Sgd.) R. C. A. PETERSON,
Notary Public. [38]

[Endorsed]: C. H. Merriam. 5804 & 5805—11:25. Mortgage. Frank C. Bertelmann to S. Kobayashi. Assigned to Mary N. Lucas, August 28, 1902. Indexed. Register Office Oahu,—ss. Received for Record this 29th day of September, A. D. 1902, at 11:25 o'clock A. M. and Recorded in Liber 215 on Pages 457. And Compared. (S) Thos. G. Thrum, Registrar of Conveyances. By ————— Deputy Registrar.

Recording Fees \$2

2. [39]

**Exhibit "I" to Agreed Statement of Facts—
Mortgage, August 13, 1902, Bertelmann to Lucas.**

Documentary stamp of the Republic of Hawaii—
\$10.00.

Documentary stamp of the Republic of Hawaii—
\$5.00.

4 Territorial stamps at \$1.00—4.00.

KNOW ALL MEN BY THESE PRESENTS that I, FRANK CHARLES BERTELMANN, of Honolulu, Island of Oahu, Territory of Hawaii, Mortgagor, in consideration of NINE THOUSAND EIGHT HUNDRED AND FORTY-FIVE DOLLARS (\$9845.) to me paid by MARY LUCAS, wife of C. Lucas, of said Honolulu, Mortgagee, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey unto the said Mary Lucas all of my right, title and interest in and to the following described land situate in the Island of Kauai, Territory of Hawaii, particularly described as follows:

1st: The Ahupuaa of Kahili, containing an area of 1789 acres more or less, being the same premises described in Royal Patent Land Commission Award 8559B. to W. C. Lunalilo and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24th, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folios 220.

2d: The Ahupuaa of West Waiakalua, containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Bertelmann by said deed.

3d: The Ahupuaa of Pilaa containing an area of 1520 acres more or less, being the same premises described in Land Commission Award 8559 B. to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4th: All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less, being the same premises conveyed to said Christian Bertelmann by deed of William Worner, dated March 31st, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folios 386-387. [40]

5th: Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

Also, all kuleanas now belonging to me situated within or adjacent to the boundaries of any of the above demised premises, and all other parcels and tracts of land upon the Island of Kauai belonging to me.

TO HAVE AND TO HOLD the granted premises, with all the rights, privileges and appurtenances thereto belonging to the said Mary Lucas, and her heirs and assigns, forever.

And I hereby for myself and my heirs, executors and administrators, covenant with the Mortgagee and her heirs and assigns that I am lawfully seized in fee simple of the granted premises; that they are free from all incumbrances except that certain indenture

of lease made by Christian Bertelmann to the Kilauea Sugar Company dated November 1st, 1890, leasing all of the aforesaid lands for the term of twenty-five years from said November 1st, 1890; that I will, and my heirs, executors and administrators shall, warrant and defend the same to the Mortgagee and her heirs and assigns forever against the lawful claims and demands of all persons.

And for the consideration aforesaid the said Mortgagor does hereby transfer, assign and set over unto the Mortgagee all the share of the Mortgagor in and to the rents due or which may hereafter become due under that certain indenture of lease from Christian Bertelmann to the Kilauea Sugar Company, dated November 1st, 1890, and the Mortgagor does hereby constitute and appoint the Mortgagee his attorney irrevocable with full power and authority to collect and [41] receive any and all of the said rents as aforesaid and to apply the same as follows:

First: To the payment of the interest due hereunder;

Second: To the payment of all taxes and assessments against said property;

Third: Any surplus to be applied annually to the payment on account of the principal sum of this mortgage.

And for the consideration aforesaid I, Mary Bertelmann, wife of the said Frank Charles Bertelmann, hereby release unto the Mortgagee and her heirs and assigns, all my right of dower in the granted premises.

PROVIDED NEVERTHELESS that if I, or my heirs, executors, administrators or assigns, shall pay

unto the mortgagee or her assigns the sum of Nine Thousand eight hundred forty-five (\$9845) dollars in three (3) years from the date hereof with interest semi-annually at the rate of ten (10%) per cent per annum, and until such payment shall pay all taxes and assessments to whomsoever laid or assessed, whether on the granted premises or any interest therein, or on the debt secured hereby; also all assessments for permanent benefit or improvement of said premises, or any part thereof, under any betterment law or otherwise, or other charges which may be legally imposed upon the property, or to which the said property or any part thereof is now or may during said term become liable; and shall comply with all rules and regulations made by the Board of Health or other authority of the Government; and shall not commit or suffer any strip or waste of the granted premises, or any breach of any covenant herein contained, and shall not suffer or do any act or negligence whereby the granted premises or any part thereof shall become liable to seizure or attachment or mesne or final process of [42] law in bankruptcy or otherwise, or whereby the security of these presents shall become lessened or impaired—then this deed, as also my note of even date herewith, signed by me, whereby I promise to pay the Mortgagee or order the said sum and interest at the times aforesaid shall be void.

BUT UPON ANY DEFAULT in the performance or observance of any of the foregoing conditions the Mortgagee, her executors, administrators or assigns, may foreclose this mortgage by bill in equity or other-

wise; may enter and take possession of said premises, or with or without entry, sell the granted premises at public auction in said Honolulu, or on the Island of Kauai, as a whole or in lots or parcels, together with all improvements that may be thereon, first publishing a notice of the time and times, and place and places of such sale or sales according to law, and may convey the premises so sold by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale or sales shall forever bar me, and all persons claiming under me, from all right and interest in the said premises, whether at law or in equity.

AND out of the money arising from such sale or sales the Mortgagee, or her representatives, shall be entitled to retain all sums then secured by this deed whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by them by reason of any default in the performance or observance of the covenants and conditions of this mortgage, and an attorney's fee, and also all advances and expenditures made necessary by any default of the Mortgagor in the performance or observance of any covenants and conditions, and in order to protect said security and save [43] said property from loss or injury, rendering the surplus, if any, to me or my heirs or assigns.

AND IT IS AGREED that the Mortgagee, her executors, administrators or assigns, or any person or persons in her or their behalf, may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the

purchase money; and that until default in the performance or observance of the condition of this deed I and my heirs and assigns may hold and enjoy the granted premises.

.....

IN WITNESS WHEREOF we, the said Frank Charles Bertelmann and Mary Bertelmann, hereunto set our hands and seals this 13th day of August, A. D. 1902.

(Signed) FRANK CHARLES BERTELMANN,
MARY BERTELMANN.

Executed in the presence of

.....

Territory of Hawaii,
Island of Oahu,—ss.

On this 13th day of August, A. D. 1902, personally appeared before me, Frank Charles Bertelmann, and Mary Bertelmann his wife, known to me to be persons described in and who executed the foregoing instrument who acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth. And the said Mary Bertelmann on an examination separate and apart from her husband further acknowledged that she executed the same without compulsion, fear or constraint from her said husband.

[Notarial Seal] (Signed) WM. B. FORBES,

Notary Public, First Judicial Circuit. [44]

[Endorsed]: 5385—1:20. Mortgage. Frank Charles Bertelmann, to Mary Lucas. Indexed. Register Office Oahu,—ss: Received for Record this 25th day of August, A. D. 1902, at 1:20 O'clock P. M.

and Recorded in Liber 236 on Pages 372-375. And Compared. (S) Thos. G. Thrum. Registrar of Conveyances. By Deputy Registrar.

Recording fees, \$7.50.

19 [45]

**Exhibit "J" to Agreed Statement of Facts—
Supreme Court Execution, December 16, 1902,
in Washington Mercantile Co. v. Bertelmann.**

In the Supreme Court of the Territory of Hawaii.

**WASHINGTON MERCANTILE COMPANY,
LIMITED,**

Plaintiff,

vs.

F. C. BERTELMANN,

Defendant.

The Territory of Hawaii.

To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the Island of Kauai, or his Deputy, or any Constable in the Territory of Hawaii:

YOU ARE COMMANDED to levy upon the personal property of F. C. BERTELMANN, defendant in the above-entitled action, and, if sufficient cannot be found, then upon his real property, within the Territory; and, having given the notice required by law, to sell at public sale to the highest bidder enough thereof to satisfy the amount of the judgment, with interest and costs, entered in said action, on the 3d day of November, A. D., 1902, in favor of Washington Mercantile Company, Limited, as follows, viz:

Damages.....	69.11
Interest.....	
Attorney's Fees and Commissions.....	6.91
Costs of Court.....	4.10

Judgment entered for.....	80.12
Interest from entry of judgment to date.....	.40
Issuing Execution.....	5.00
Costs of Execution & bond in Lower Court (re- turned unsatisfied).....	2.00

Total—EIGHTY-SEVEN AND 52/100

DOLLARS87.52

Collect also legal interest thereon from date hereof, with your costs and expenses, and make return of this Writ within sixty days, with the proceeds by you collected. Hereof fail not at your peril.

WITNESS the Honorable WALTER F. FREAR, Chief Justice of said Supreme Court, at Honolulu, this 16th day of December, 1902.

(Signed) J. A. THOMPSON,
Clerk Supreme Court.

[Endorsed]: L. 5473—20/362. Supreme Court, Territory of Hawaii. Washington Mercantile Company, Limited, vs. F. C. Bertelman. Execution. Issued December 16, 19—2, at 12 o'clock M. (Sgd.) J. A. Thompson, Clerk. Returned February 17, 1903, at 2:10 o'clock P. M. (Sgd.) J. A. Thompson, Clerk. [46]

**Exhibit "K" to Agreed Statement of Facts—
Deed, February 7, 1903, High Sheriff of
Territory of Hawaii to Lucas.**

Stamps Ter. \$1.00.

KNOW ALL MEN BY THESE PRESENTS, that I, ARTHUR M. BROWN, High Sheriff of the Territory of Hawaii, on this 7th day of February, A. D. 1903, in pursuance of a Writ of Execution to me issued on the 16th day of December, A. D. 1902, out of the Supreme Court of the Territory of Hawaii, for the sum of Eighty-seven Dollars and Fifty-two Cents (\$87.52), on a judgment rendered by the said Supreme Court in a certain cause wherein the WASHINGTON MERCANTILE COMPANY, LIMITED, a Corporation duly established and existing under the laws of the Territory of Hawaii, were Plaintiffs, and F. C. BERTELMAN was Defendant, the said Writ commanding the High Sheriff of the Territory of Hawaii to levy upon the personal property of the said F. C. BERTELMAN, Defendant in the above-entitled action, and, if sufficient cannot be found, then upon his real property, within the Territory; and, having given the notice required by law, to sell at Public Sale to the highest bidder enough thereof to satisfy the amount of the said judgment, with interest and costs, entered in said action, on the 3d day of November, A. D. 1902, together with legal interest thereon from the said 16th day of December, A. D. 1902, and my costs and expenses; I have, therefore, levied upon the property of the said F. C. BERTELMAN, Defendant in said action, and did in pur-

suance of said Writ expose for sale at Public Auction at the Police Station, Kalakaua Hale, in Honolulu, Island of Oahu, Territory of Hawaii, at 12 o'clock Noon, of Saturday, the 7th day of February, A. D., 1903, and did sell the following described property of the Defendant, to wit:

“1. All that certain lot of land situated at Pilaa, Island of Kauai, containing about 10 Acres, devised to said F. C. BERTELMAN by the last Will and Testament of his father, C. BERTELMAN, deceased, and in said Will described at Lot No. 2.”

“2. All the following described lands of C. BERTELMAN ESTATE situated on the Island of Kauai, Territory of Hawaii, in which the said F. C. BERTELMAN will have, after the expiration of the [47] Lease to the KILAUEA SUGAR COMPANY, for 25 years from the 1st day of November, A. D. 1890, a one-third interest:

“Ahupuaa of Kahili, 1789 Acres;

“Ahupuaa of West Waiakalua, 332.4 Acres;

“Ahupuaa of Pilaa, 1520 Acres;

“Land of Lepeuli, 102 Acres;

“5 shares Moloaa Hui Land and sundry Kuleanas,” to MARY LUCAS, wife of CHARLES LUCAS, of said Honolulu, she being the highest bidder therefor, for the sum of Thirty Dollars (\$30.) for the First described parcel of land, and Fifty Dollars (\$50.) for the Second described lands, a total of Eighty Dollars (\$80.);

AND IN CONSIDERATION of the said sum of Eighty Dollars, (\$80.) to me paid by the said MARY LUCAS, the receipt whereof is hereby acknowledged,

I do hereby grant, bargain, sell, assign, transfer and convey unto the said MARY LUCAS, all the right, title and interest of the said F. C. BERTELMAN in and to the said property as above described.

TO HAVE AND TO HOLD the aforementioned and described interest, together with all and singular the tenements, hereditaments and appurtenances thereto belonging, to the said MARY LUCAS, her heirs and assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of February, A. D. 1903.

(Signed) ARTHUR M. BROWN,
High Sheriff, Territory of Hawaii.

Territory of Hawaii,

Island of Oahu,—ss.

On this 9th day of February, A. D. 1903, personally appeared before me ARTHUR M. BROWN, High Sheriff of the Territory of Hawaii, known to me to be the person described in and who executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Seal] (Signed) CHAS. F. CHILLING-
WORTH,

Notary Public, in and for the First Judicial Circuit,
Territory of Hawaii. [48]

[Endorsed]: 7284—11:35. Bill of Sale. Arthur M. Brown, High Sheriff, Ter. of Haw. to Mary Lucas. Honolulu, H. T. Dated, February 7, A. D. 1903. Consideration: \$80. Interest of F. C. Bertelman in Lands on Kauai. (Indexed.) Register Office Oahu,—ss. Received for Record this 11th Day of

February A. D. 1903, at 11:35 o'clock A. M., and Recorded in Liber 248 on Pages 82–84 and Compared. (Signed) Thos. G. Thrum, Registrar of Conveyances. By, Deputy Registrar.

Recording Fees \$3.50 Pd. 1.

3.50 Pd. [49]

**Exhibit "L" to Agreed Statement of Facts—Deed,
March 14, 1903, Smith to Lucas.**

Stamps Ter. \$1.00.

KNOW ALL MEN BY THESE PRESENTS: That I, JUSTINE BERTELMANN SMITH, wife of W. J. Smith, of Honolulu, Island of Oahu, Territory of Hawaii, in consideration of Fifty Dollars (\$50) to me paid by MARY N. LUCAS, wife of Charles Lucas of said Honolulu, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey all of my undivided right, title, interest and estate, claim and demand, vested or contingent, present or prospective, in law or in equity, in and to the following tracts and parcels of land situated on the Island of Kauai, Territory of Hawaii, viz.:

1st. The Ahupuaa of Kahili containing an area of 1789 acres, more or less, being the same premises described in Royal Patent Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folio 220;

2nd. The Ahupuaa of West Waiakalua containing an area of 332 40/100 acres more or less, being

premises also conveyed to said Christian Bertelmann by said deed;

3rd. The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunailo, and conveyed to said Christian Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284;

4th. All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less; being the same premises conveyed to said Christian Bertelmann by deed of Wm. Worner, dated March 31st, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folios 386-387; [50]

5th. Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same;

6th. All kuleanas situated within or adjacent to the boundaries of any of the above-described premises, and all other parcels and tracts of land upon the Island of Kauai heretofore owned by Christian Bertelmann;

7th. All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises;

8th. All leases of any portion of said premises made by the said Christian Bertelmann, together with all rents, remainders and reversions of the same. And being the same premises leased by Christian

Bertelmann to the Kilauea Sugar Company, a corporation, by lease dated November 1, A. D. 1890, and devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii.

TO HAVE AND TO HOLD all said undivided right, title, interest and estate, claim and demand in said premises with all the rights, privileges and appurtenances thereto belonging to the said Mary N. Lucas, and her heirs and assigns forever.

And I hereby for myself and my heirs, executors and administrators covenant with said Mary N. Lucas and her heirs and assigns that I am lawfully seized in fee simple of the granted right, title, interest and estate in said premises; that they are free from all incumbrances, save and except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann, dated November 1, 1890, for the term of twenty-five (25) years from November 1, 1890, at an annual rental of Six Thousand Dollars (\$6000); that I will, and my heirs, executors and administrators shall warrant and defend the same to the said Mary N. Lucas and her heirs and assigns forever against the lawful claims and [51] demands of all persons, save under said lease.

And for the consideration aforesaid I do hereby transfer, assign, and set over unto the said Mary N. Lucas and her heirs and assigns forever, all my right, title and interest in and to any and all rents due or to become due to me under the aforesaid lease to said Kilauea Sugar Company, or any other and all leases

of said premises or any portion thereof.

And I, W. J. Smith, husband of said Justine Bertelmann Smith, for said consideration do hereby consent to and approve of the foregoing conveyance.

IN WITNESS WHEREOF, we the said Justine Bertelmann Smith and W. J. Smith hereunto set our hands and seals this 14th day of March, 1903.

(Signed) JUSTINE BERTELMANN SMITH.

(Signed) WM. J. SMITH.

Executed in presence of:

(Signed) WM. J. FORBES.

Territory of Hawaii,

Island of Oahu,—ss.

On this 14th day of March, A. D. 1903, personally appeared before me, Justine Bertelmann Smith and Wm. J. Smith her husband, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth. And the said Justine Bertelmann Smith on an examination by me separate and apart from her husband further acknowledged that she executed the same without compulsion, fear or constraint from her said husband.

[Seal] (Signed) WM. J. FORBES,

Notary Public, First Judicial Circuit. [52]

[Endorsed]: 7648—1:41. Deed. Justine Bertelmann Smith to Mary N. Lucas. Dated March 14, 1903. (Indexed.) Register Office, Oahu ss: Received for record this 16th day of March, A. D. 1903, at 1:41 o'clock P. M. and recorded in Liber 248, on

pages 190, 191, 192, and compared. (Signed) Thos. G. Thrum, Registrar of Conveyances. By, Deputy Registrar.

Recording Fees, \$5.00.

1. [53]

**Exhibit "M" to Agreed Statement of Facts—Deed,
May 18, 1903, Bannister to Lucas.**

Territorial Stamps—\$9.00.

KNOW ALL MEN BY THESE PRESENTS:
That MARY JOSEPHINE HATTIE BERTELMANN BANNISTER, wife of Andrew T. Bannister, of Honolulu, Island of Oahu, Territory of Hawaii, in consideration of Two Thousand Five Hundred Dollars (\$2,500) to me paid by MARY N. LUCAS, wife of Charles Lucas of said Honolulu, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey all of my right, title, interest and estate, claim and demand, vested or contingent, present or prospective, in law or in equity, in and to the following tracts and parcels of land situated on the Island of Kauai, Territory of Hawaii, viz.:—

1st: The Ahupuaa of Kahili containing an area of 1789 acres more or less, being the same premises described in Royal Patent Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folio 220.

2d: The Ahupuaa of West Waiakalua, containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Bertelmann by said deed.

3d: The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to said Christian Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4th: All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less, being the same premises conveyed to said Christian Bertelmann by deed of Wm. Worner, dated March 31st, 1883, of record in the [54] Hawaiian Registry of Deeds in Liber 79, folios 386, 387.

5th: Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6th: All kuleanas situated within or adjacent to the boundaries of any of the above-described premises, and all other parcels and tracts of land upon the Island of Kauai heretofore owned by Christian Bertelmann.

7th: All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises.

8th: All leases of any portion of said premises made by the said Christian Bertelmann together with all rents, remainders and reversions of the same, and being the same premises leased by Christian Bertelmann to the Kilauea Sugar Company, a corporation, by lease dated November 1, A. D. 1890, and

devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii.

9th: All that piece or parcel of land situate at Pilaa, Island of Kauai, Territory of Hawaii, devised to me by the will of Christian Henry Bertelmann, dated the 12th day of December, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii, and known as Lot Number Eight (8) on the map attached to said will.

TO HAVE AND TO HOLD all said right, title, interest and estate, claim and demand in said premises with all the rights, privileges and appurtenances thereto belonging to the said Mary N. Lucas, and her heirs and assigns forever.

AND I hereby for myself and my heirs, executors, and administrators, covenant with said Mary N. Lucas and her heirs and assigns that I am lawfully seized in fee simple of the granted [55] premises; that they are free from all incumbrances, save and except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann, dated November 1, 1890, at an annual rental of Six Thousand Dollars (\$6,000); that I will, and my heirs, executors and administrators shall warrant and defend the same to the said Mary N. Lucas and her heirs and assigns forever against the lawful claims and demands of all persons save under said lease.

AND for the consideration aforesaid I do hereby transfer, assign, and set over unto the said Mary N. Lucas and her heirs and assigns forever, all my right,

title, interest, share and proportion, of, in and to any and all rents due or to become due under the aforesaid lease to said Kilauea Sugar Company or any other and all leases of said premises or any portion thereof.

AND I, Andrew T. Bannister, husband of said Mary Josephine Hattie Bertelmann Bannister, for said consideration do hereby consent to and approve of the foregoing conveyance.

IN WITNESS WHEREOF, we, the said Mary Josephine Hattie Bertelmann Bannister and Andrew T. Bannister, hereunto set our hands and seals this 18th day of May, 1903.

(Signed) MRS. HATTIE BANNISTER.

(Signed) ANDREW T. BANNISTER.

Executed in presence of:

(Signed) R. D. MEAD. [56]

Territory of Hawaii,
Island of Oahu,—ss.

On this 18th day of May, A. D. 1903, personally appeared before me, Mary Josephine Hattie Bertelmann Bannister, usually known as Hattie Bannister, and Andrew T. Bannister, her husband, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth. And the said Mary Josephine Hattie Bertelmann Bannister, known as Hattie Bannister, on an examination by me separate and apart from her husband further acknowledged that she executed the

same without compulsion, fear or constraint from her said husband.

[Seal] (Signed) WM. J. FORBES,
Notary Public, First Judicial Circuit. [57]

[Endorsed]: 8863-10:40. Deed. Mary Josephine Hattie Bertelmann Bannister to Mary N. Lucas. Dated May 18, 1903. (Indexed.) Register Office, Oahu,—ss: Received for record this 6th day of July, A. D. 1903, at 10:40 o'clock A. M. and recorded in Liber 249, on pages 314, 315 and 316, and compared. (Signed) Thos. G. Thrum, Registrar of Conveyances. By, Deputy Registrar.

Recording Fees, \$5.50.

9. [58]

**Exhibit "N" to Agreed Statement of Facts—Deed,
October 12, 1904, Ross to Lucas.**

Stamps Territorial—\$6.00.

KNOW ALL MEN BY THESE PRESENTS,
That I, BEATRICE BERTELMANN ROSS, wife
of R. G. Ross, of Honolulu, Island of Oahu, Territory
of Hawaii, in consideration of the sum of Two Thou-
sand (\$2,000) Dollars to me paid by Mary N. Lucas,
wife of Charles Lucas of said Honolulu, the receipt
whereof is hereby acknowledged, hereby give, grant,
bargain, sell and convey all of my right, title, interest
and estate, claim and demand, vested or contingent,
present or prospective in law or in equity, in and to
the following tracts and parcels of land situated on
the Island of Kauai, Territory of Hawaii, viz:—

1st: The Ahupuaa of Kahili containing an area of
1789 acres, more or less, being the same premises de-

scribed in Royal Patent Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folio 220.

2d: The Ahupuaa of West Waiakalua, containing an area of 332 40/100 acres, more or less, being premises also conveyed to said Christian Bertelmann by said deed.

3d: The Ahupuaa of Pilaa containing an area of 1520 acres, more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to said Christian Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4th: All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres, more or less, being the same premises conveyed to said Christian Bertelmann by deed of Wm. Worner, dated March 31st, 1883, of record in the [59] Hawaiian Registry of Deeds in Liber 79, folios 386, 387.

5th: Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6th: All kuleanas situated within or adjacent to the boundaries of any of the above-described premises, and all other parcels and tracts of land upon the Island of Kauai heretofore owned by Christian Bertelmann.

7th: All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises.

8th: All leases of any portion of said premises made by the said Christian Bertelmann together with all rents, remainders and reversions of the same,

And being the same premises leased by Christian Bertelmann to the Kilauea Sugar Company, a corporation, by lease dated November 1, A. D. 1890, and devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii.

Also all that piece or parcel of land situate at Pilaa, Island of Kauai, Territory of Hawaii, devised to me by the will of said Christian Henry Bertelmann, dated the 12th day of December, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii, and known as Lot No. 9 on the map attached to said will.

TO HAVE AND TO HOLD all said right, title, interest and estate, claim and demand in said premises with all the rights, privileges and appurtenances thereto belonging to the said Mary N. Lucas, and her heirs and assigns forever.

AND I hereby for myself and my heirs, executors, and administrators, covenant with said Mary N. Lucas and her heirs and assigns that I am lawfully seized in fee simple of the [60] granted premises; that they are free from all incumbrances, save *that* except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann,

dated November 1, 1890, at an annual rental of Six Thousand Dollars (\$6,000); that I will, and my heirs, executors and administrators shall warrant and defend the same to the said Mary N. Lucas and her heirs and assigns forever against the lawful claims and demands of all persons save under said lease.

AND for the consideration aforesaid I do hereby transfer, assign, and set over unto the said Mary N. Lucas and her heirs and assigns forever, all my right, title, interest, share and proportion, of, in and to any and all rents due or to become due under the aforesaid lease to said Kilauea Sugar Company, or any other and all leases of said premises or any portion thereof;

AND I, R. G. Ross, husband of said Beatrice Bertelmann Ross, for the consideration aforesaid, do hereby consent to, and approve of, the foregoing conveyance.

IN WITNESS WHEREOF, we the said Beatrice Bertelmann Ross and R. G. Ross, hereunto set our hands and seals this 12th day of October, 1904.

(Signed) BEATRICE BERTELMANN
ROSS.

(Signed) RIDEAU G. ROSS. [61]

Territory of Hawaii,
Island of Oahu,—ss.

On this 12th day of October, A. D. 1904, personally appeared before me Beatrice Bertelmann Ross and Rideau G. Ross, her husband, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily for the uses

and purposes therein set forth. And the said Beatrice Bertelmann Ross, on an examination by me separate and apart from her husband, further acknowledged that she executed the same without compulsion, fear or constraint from her said husband.

[Seal] (Signed) WM. J. FORBES,
Notary Public, First Judicial Circuit. [62]

[Endorsed]: 2745-3:03. Deed. Beatrice Ross to Mary Lucas. Dated October 12, 1904. (Indexed.) Register Office, Oahu,—ss: Received for record this 12th day of October, A. D. 1904, at 3:03 o'clock P. M. and recorded in Liber 258 on pages 427-429, and compared. (Sgd.) Chas. H. Merriam, Registrar of Conveyances. By, Deputy Registrar.

Recording fees, \$5.00.

6. [63]

**Exhibit "O" to Agreed Statement of Facts—Deed,
January 16, 1907, Hogan to Lucas.**

Stamps Ter.—\$9.00.

KNOW ALL MEN BY THESE PRESENTS:
That I, ANGELINE K. HOGAN, wife of J. J. Hogan, of Honolulu, Island of Oahu, Territory of Hawaii, in consideration of Three Thousand Dollars (\$3,000.00) to me paid by MARY N. LUCAS, wife of Charles Lucas, of said Honolulu, the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey all of my undivided right, title, interest and estate, claim and demand, vested or contingent, present or prospective, in law or in equity, in and to the following tracts and parcels of land situated on the Island of Kauai, Territory of Hawaii, viz:—

1st: The Ahupuaa of Kahili, containing an area of 1789 acres, more or less, being the same premises described in Royal Patent Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Bertelmann by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folio 220;

2d: The Ahupuaa of West Waiakalua, containing an area of 332 40/100 acres, more or less, being premises also conveyed to said Christian Bertelmann by said deed;

3d: The Ahupuaa of Pilaa, containing an area of 1520 acres, more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to said Christian Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5th, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284;

4th: All that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres, more or less; being the same premises conveyed to said Christian Bertelmann [64] by deed of William Worner, dated March 31st, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folios 386, 387;

5th: Five undivided shares or parts of shares in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same;

6th: All kuleanas situate within or adjacent to the boundaries of any of the above-described premises, and all other parcels and tracts of land upon the

Island of Kauai heretofore owned by Christian Bertelmann;

7th: All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises.

8th: All leases of any portion of said premises made by the said Christian Bertelmann together with all rents, remainders and reversions of the same.

Said lands and premises above enumerated, being the same premises leased by Christian Bertelmann to the Kilauea Sugar Company, a corporation, by lease dated November 1, A. D. 1890, and devised and bequeathed to me by will of said Christian Bertelmann, dated December 12, 1891, and now on file in the Clerk's office of the Supreme Court of the Territory of Hawaii.

TO HAVE AND TO HOLD all said lands and premises and all my undivided right, title, interest and estate, claim and demand therein with all the rights, privileges and appurtenances thereto belonging to the said Mary N. Lucas, and her heirs and assigns forever.

AND I hereby for myself and my heirs, executors and administrators covenant with said Mary N. Lucas and her heirs and assigns that I am lawfully seized in fee simple of the granted right, title, interest and estate in said premises; that they [65] are free from all incumbrances, save and except that certain lease to the Kilauea Sugar Company made by Christian Bertelmann dated November 1, 1890, for the term of twenty-five (25) years from November 1, 1890, at an annual rental of Six Thousand Dol-

lars (\$6,000); that I will, and my heirs, executors and administrators shall warrant and defend the same to the said Mary N. Lucas and her heirs and assigns forever against the lawful claims and demands of all persons, save under said lease.

AND for the consideration aforesaid I do hereby transfer, assign, and set over unto the said Mary N. Lucas and her heirs and assigns forever, all my right, title and interest in and to any and all rents due or to become due to me under the aforesaid lease to said Kilauea Sugar Company, or any other and all leases of said premises or any portion thereof.

AND, I, J. J. Hogan, husband of said Angeline K. Hogan, for said consideration do hereby consent to and approve of the foregoing conveyance, and release and quitclaim unto the said Mary N. Lucas, and her heirs and assigns, all my right, title and interest in and to the said premises hereinabove described.

IN WITNESS WHEREOF we, the said Angeline K. Hogan and J. J. Hogan, hereunto set our hands and seals this 16th day of January, A. D. 1907.

(Signed) ANGELINE K. HOGAN,

(Signed) JOSEPH J. HOGAN. [66]

Territory of Hawaii,
County of Oahu,—ss.

On this Sixteenth day of January, A. D. 1907, personally appeared before me Angeline K. Hogan and Joseph J. Hogan, her husband, known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and volun-

tarily and for the uses and purposes therein set forth. AND said Angeline K. Hogan on a private examination by me held separate and apart from her said husband further acknowledged to me that she executed the same freely and without any compulsion, fear or constraint of her said husband.

[Seal] (Signed) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: 665-3:32. Deed. Angeline K. Hogan to Mary N. Lucas. Dated, January 1907. (Indexed). Register Office Oahu, ss: Received for Record this 16th day of January, A. D. 1907, at 3:32 o'clock P. M. and recorded in Liber 287 on pages 154-157, and compared. (Sgd.) Chas. H. Merriam, Registrar of Conveyances. By, Deputy Registrar. Recording Fees, \$5.00.

9. [67]

**Exhibit "P" to Agreed Statement of Facts—Deed,
November 29, 1915, Baker to Lucas.**

Stamps U. S. Revenue—\$5.00.

Stamps Ter.—\$12.00.

Know all men by these presents, that I, Wilhelmina B. Baker, formerly Wilhelmina B. Hall, and originally Wilhelmina Bertelmann, of Honolulu, Oahu, Territory of Hawaii, daughter of Christian Henry Bertelmann, late of Pilaa, Kauai, in consideration of Five Thousand Dollars (\$5,000.00) to me paid by Mary N. Lucas of said Honolulu, receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey, remise, release and forever

quitclaim unto the said Mary N. Lucas all of the right, title, interest, estate, claim and demand, vested or contingent, present or prospective, in law or in equity, devised to me under the will of said Christian Henry Bertelmann, in and to all of the lands and property described in Schedule "A" hereunder written and hereby made a part hereof, and also in and to all other lands, if any, wheresoever situate left by my father, the said Christian Henry Bertelmann, at the time of his death, together with all other, if any, my right, title and interest in and to the said lands and property and every part thereof, excepting only from this conveyance and release the same one hundred (100) acres of land situate on the south side of the Government road in said Pilaa in which are included the homestead premises of the said Christian Henry Bertelmann, testator as aforesaid, and which said parcel of one hundred (100) acres is described by metes and bounds in Schedule "B" hereunder written and hereby made a part hereof and which said parcel of one hundred (100) acres is the same parcel devised in and by paragraph marked "Second" in the said Will of said testator:

SCHEDULE "A" HEREINABOVE REFERRED
TO.

All of the following tracts and parcels of land and other [68] property situated on the Island of Kauai, to wit:

1. The Ahupuaa of Kahili containing an area of 1789 acres more or less; being the same premises described in Royal Patent—Land Commission

Award 8559B to W. C. Lunalili, and conveyed to Christian Henry Bertelmann, late of Pilaa, Kauai, now deceased, by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86 folios 220.

2. The Ahupuaa of West Waiakalua containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Henry Bertelmann by said deed.

3. The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5, 1878, of record in the Hawaiian Registry of Deeds in Liber 53 folio 284.

4. All of that fact of land situated at Lepeuli District of Koolou, Kauai, containing an area of 102 acres more or less; being the same premises conveyed to said Christian Henry Bertelmann by deed of Wm. Worner, dated March 31, 1883, of record in the Hawaiian Registry of Deeds in Liber 79 folio 386-387.

5. Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6. All kuleanas belonging to the said Christian Henry Bertelmann situated within or adjacent to the boundaries of any of the above-described premises and all other parcels and tracts of land upon the Island of Kauai owned by the said Christian

Henry Bertelmann at the time of his death.

7. All streams of water and water rights upon or appurtenant [69] to all and singular the above-mentioned premises.

8. All leases of any portion of said premises made by Christian Henry Bertelmann together with all rents, remainders, and reversions of the same.

And being the same premises leased by my father, the said Christian Henry Bertelmann, to the Kilauea Sugar Company, a corporation, by lease dated November 1, 1890.

SCHEDULE "B" HEREINABOVE REFERRED
TO.

Commencing on the south side of the Government road at a stone, beneath a horse-shoe and running: S. S. W. 1400 feet; thence S. S. E. 850 feet; thence E. 1906 feet; thence S. by W. 1-3 W. 1920 feet; thence E. by S. $\frac{3}{4}$ S. 2032 feet; containing an area of one hundred (100) acres and no more, and these foregoing metes and bounds shall yield to the area in case of discrepancy.

To have and to hold the granted and released premises with all of the rights, easements, privileges and appurtenances thereto appertaining unto the said Mary N. Lucas and her heirs and assigns, to their own use and behoof forever.

And I, the said Wilhelmina B. Baker, for myself and my heirs, executors and administrators, do hereby covenant with the said Mary N. Lucas and her heirs and assigns, that the granted and released premises are free and clear of all encumbrances

made or suffered by me, and that I will and my heirs, executors and administrators shall warrant and defend the same to the said Mary N. Lucas and her heirs and assigns against the lawful claims and demands of all persons claiming by, through, or under me, but against none other. [70]

And for the consideration aforesaid, I, Charles H. Baker, husband of the said Wilhelmina B. Baker, do hereby assent to the execution and delivery by my said wife of this conveyance and release.

In witness whereof, we, the said Wilhelmina B. Baker and Charles H. Baker, her husband, hereunto set our hands and seals this 29th day of November, A. D. 1915.

(Signed) WILHELMINA B. BAKER.

(Signed) CHARLES H. BAKER.

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 29th day of November, A. D. 1915, before me personally appeared Wilhelmina B. Baker and Charles H. Baker, her husband, known to me to be the persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same of their free act and deed.

[Seal] (Signed) J. M. CAMARA,

Notary Public, First Judicial Circuit, Territory of Hawaii. [71]

[Endorsed]: 13900-4:11. Quitclaim Deed. Dated, November 29, 1915. Wilhelmina B. Baker to Mary N. Lucas. (Indexed.) Territory of Hawaii. Office of Registrar of Conveyances. Re-

ceived for Record this 29th day of November, A. D. 1915, at 4:11 o'clock, P. M. and Recording in Liber 435 on pages 330-333, and compared. (Signed) Chas. H. Merriam, Registrar of Conveyances. By _____, Deputy Registrar.

Recording Fee, \$5.50 Paid.

12. [72]

No. 927. Supreme Court. Territory of Hawaii. October Term, 1915. Walter W. Scott, Janet M. Scott, Rubena F. Scott, and the Bishop Trust Company, Limited, Guardian, v. Mary N. Lucas. Submission on Case Agreed. Statement of Case. Filed February 28, 1916, at 10:25 A. M. J. A. Thompson, Clerk. [73]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1915.

BEFORE THE JUSTICES OF SAID COURT.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LTD., a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT, and RUBENA F. SCOTT, Minors,

Plaintiffs,

v.

MARY N. LUCAS,

Defendant.

Amendments to Agreed Statements of Facts.

SUBMISSION ON CASE AGREED.

The parties hereto do hereby stipulate and agree

that the submission heretofore filed herein be amended by inserting immediately following the paragraph thereof marked "18," the following paragraphs:

18a. That the plaintiffs herein claim that under the terms of the will aforesaid of the said Christian Henry Bertelmann, and particularly under the terms of the paragraph or article thereof marked "Third," they are entitled to receive, in order that the interest they claim to have in the lands referred to in Article marked "Third" in the will of said testator may be defeated, from the said Mary N. Lucas, grantee and assignee as aforesaid of the three sons aforesaid of the said Christian Henry Bertelmann, the sum of five thousand (\$5000) dollars which their mother would have been entitled to receive from the said three sons or their grantee or assignee had she survived the expiration of the twenty-five year lease made by the said Christian Henry Bertelmann to the said Kilauea Sugar Company and referred to in the said will of the said [74] Christian Henry Bertelmann; that the plaintiffs further claim that the right to receive and the duty to pay the respective sums of five thousand (\$5000) dollars referred to in said article or paragraph marked "Third" in said will are by the said will made contingent upon the survival of each of the daughters of the said testator, including the said Catherine Haunani Scott, at the time of the death of the testator and are not made contingent upon such survival at the expiration of the said twenty-five year lease; and that the plain-

tiffs further claim that they together are now the owners of an undivided one-ninth interest (an undivided one-twenty-seventh each) in all of the lands of the said testator referred to in said paragraph or article marked "Third" in his said will, subject only to their said title and interest being defeated by and upon the payment to them, within one year from November 1, 1915, of the sum of five thousand (\$5000) dollars in all under and in accordance with the provisions of said paragraph or article marked "Third," and that they are entitled to a one-ninth (a one twenty-seventh each) of all the rents and issues of said lands.

18b. That the defendant herein claims that under the terms of the will aforesaid of the said Christian Henry Bertelmann, and particularly under the terms of the paragraph or article thereof marked "Third," neither the said plaintiffs nor any of them are entitled to receive from the said Mary N. Lucas, grantee and assignee as aforesaid of the three sons aforesaid of the said Christian Henry Bertelmann, or at all, the sum of five thousand (\$5000) dollars or any other sum which their mother would have been entitled to receive from the said three sons or their grantee or assignee had she survived the expiration of the twenty-five year lease aforesaid; that the defendant herein further claims that the right to receive [75] and the duty to pay the respective sums of five thousand (\$5000) dollars referred to in said article or paragraph marked "Third" in said will were by the said will made contingent upon the survival of each of the daugh-

ters of the testator, including the said Catherine Haunani Scott, until and at the expiration of the said twenty-five year lease and not merely until or at the death of the testator aforesaid; and that the defendant herein further claims that the said plaintiffs have, and each of them has, no right, title, interest or estate in or to any of the lands of the said testator referred to in paragraph or article marked "Third" in his said will or in or to any sum or payment of five thousand (\$5000) dollars referred to or provided for in said paragraph or article in said will, or in the rents and issues of said lands; and that the said Mary N. Lucas, defendant as aforesaid, is now the undisputable owner, i. e., the owner in fee simple, absolute and indefeasible, of all of the lands of the said testator referred to in said paragraph or article marked "Third" without making any payment of the sum of five thousand (\$5000) dollars or any other sum to the three plaintiffs or to any of them.

18c. That the plaintiffs on the one hand and the defendant on the other hand held and advanced to each other, prior to the institution of the above-entitled proceeding, the conflicting views and claims hereinabove set forth in paragraphs marked "18a" and "18b" and were and are unable to reconcile and settle the same.

The parties herein further stipulate and agree that the submission herein may be regarded as amended in the foregoing particulars upon the court's assent hereto being duly recorded,—[76]

and without the filing of a new or amended submission.

Dated, Honolulu, T. H., April 22, 1916.

WALTER M. SCOTT,

JANET SCOTT, and

RUBENA F. SCOTT, Minors, etc.,

By Their Attorney,

(Sgd.) E. A. MOTT-SMITH,

MARY N. LUCAS,

By Her Attorney,

(Sgd.) A. PERRY.

The foregoing amendment may be regarded as made.

Dated, Honolulu, T. H., April 22, 1916.

By the Court.

(Sgd.) J. A. THOMPSON,

Clerk.

Approved:

(Sgd.) A. G. M. ROBERTSON,

Chief Justice. [77]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Walter W. Scott Janet M. Scott, Rubena F. Scott, and the Bishop Trust Company, Limited, Guardian v. Mary N. Lucas. Submission on Case Agreed. Amendment to Submission. Filed April 22, 1916, at 11:55 A. M. J. A. Thompson, Clerk. [78]

In the Supreme Court of the Territory of Hawaii.
OCTOBER TERM, 1915.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and
THE BISHOP TRUST COMPANY, LIM-
ITED, a Corporation, Guardian of the Estate
of Said WALTER W. SCOTT, JANET M.
SCOTT and RUBENA F. SCOTT, Minors,
v.

MARY N. LUCAS.

Opinion.

No. 927.

SUBMISSION UPON AGREED STATEMENT
OF FACTS.

Argued April 13, 1916.

Decided June 13, 1916.

ROBERTSON, C. J., WATSON & QUARLES, JJ.

Wills—Vested Remainder—Defeasance—Condition
Impossible of Performance.

Where by a last will and testament a remainder in fee
is vested in a devisee subject to defeasance by a
condition subsequent and prior to the perform-
ance of the condition such condition becomes im-
possible of performance, the vested remainder
becomes absolute in the devisee and no longer
subject to the defeasance provided for in the will.

[79]

OPINION OF THE JUSTICES, BY QUARLES, J.
(ROBERTSON, C. J., dissenting.)

This is a controversy submitted upon agreed facts

to obtain a decree quieting title to an undivided one-ninth interest in and to certain lands described in the submission of facts. The plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minor children of Catherine Haunani Scott (nee Bertelmann), appear by their guardian as plaintiffs, and Mary N. Lucas, who claims the said undivided interest, appears as defendant. The settlement of this controversy depends upon the construction of certain provisions in the last will and testament of Christian Henry Bertelmann, upon which the merits of the controversy must be decided. This will has heretofore been before this Court for construction and the provisions here involved construed (*Bertelmann v. Kahilina*, 14 Haw. 378), where it was held that each of the six daughters of the testator, under the first and fourth items of the will, took vested remainders in fee subject to defeasance upon payment to each of them of the sum of \$5,000 by the three sons, or one or more of them, of the testator, as provided in the third item of the will. That item reads:

“At the expiration of the 25 years lease with the Kilauea Sugar Co. it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons: Frank Charles, Henry Godfrey, and Christian Sylvester Bertelmann or then surviving sons or son. Provided, however, that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand dollars \$5000. In case one or two of my sons should

be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the \$5000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

“1. To each of my daughters or surviving daughters the amount aforesaid of \$5000.00.

“2. To my shortcoming son or sons the same amount [80] of \$5000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above-mentioned conditions.

“3. To my wife Susan Bertelmann a life rent of \$2000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate.”

The defendant has purchased all of the interest of the three sons and of all of the daughters except the late mother of the plaintiffs, she having died September 10, 1905, leaving the plaintiffs as her surviving children. The lease mentioned in the will has expired, and the one year in which the sons, or one or more of them, may purchase or acquire the interest of their sisters under the third item of the will, hereinabove quoted, is now running. It is contended on behalf of the defendant that Mrs. Scott, mother of the plaintiffs, having died prior to the expiration

of the lease, the plaintiffs have no interest in the lands in question, and that the provision as to payment of \$5000 to each of the daughters does not apply to the interest which Mrs. Scott would have if she had survived the expiration of the lease; and, that the defendant takes the whole freed from the charge of said \$5000. In furtherance of this contention it is earnestly insisted on the part of the defendant that the former decision to the effect that Mrs. Scott and the other daughters took vested remainders in fee is incorrect and that their interests, respectively, are, and were, contingent upon their survival of the expiration of the lease, and upon the failure of the sons, or one or more of them, to pay to the daughters the \$5000 each. These contentions were, we think, correctly disposed of in the former decision of this Court, for the reasons therein stated. The mother of the plaintiffs took a vested remainder in fee, subject to be defeated by the payment to her by the sons, or one or more of them, of the [81] sum of \$5000 within one year after the expiration of the lease. We do not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years, and which has become an established rule of property so far as the rights here involved are concerned. The former decision, which simplifies and narrows the questions to be here decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privilege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remainder in the

daughters depended upon a condition subsequent—the payment to each daughter of the sum of \$5000 at the time and in the manner prescribed in the will. The difference between a condition precedent and a condition subsequent is well described in *Winthrop v. McKim*, 51 How. Prac. 323, where the Court at page 327 says:

“Conditions precedent are such as must happen or be performed before the estate can vest.

“Conditions subsequent are such as when they happen or are performed, or are not performed, as the case may be, divest, curtail or abridge an estate already vested.

“It is also a well settled rule that, where an estate is to arise upon a condition precedent, if the condition becomes impossible no estate or interest grows thereupon.

“Upon the other hand, if the performance of a condition subsequent becomes impossible, the condition is void, and the estate vests as though no condition had been imposed.”

These rules are supported by practically all authority, English and American, from the time of Sir William Blackstone to the present. Blackstone (Book 2, 154, 156) says:

“An estate on condition expressed in the grant itself, is where an estate is granted, either in fee-simple or otherwise, with the express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are, therefore,

either precedent or subsequent. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or nonperformance of which an estate [82] already vested may be defeated.

* * * These express conditions, if they be impossible at the date of their creation, or afterward become impossible by the act of God or of the feoffer himself, or if they be contrary to law, or repugnant to the nature of the estate, are void," See 2 Jarman, Wills, 5th ed., pp. 10, 11."

It is well settled that a condition precedent to the vesting of an estate must be strictly construed and fully performed (*Nevins v. Gourley*, 95 Ill. 206, 213; *Martin v. Ballou*, 13 Barb. 119, 132; 4 Kent's Com. (13 ed.) 135, and authorities cited in note c.).

It is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of \$5,000, a privilege granted to the sons, or one or more of them, by the testator. That condition becoming impossible by the act of God is as though it was never made. The plaintiffs inherited from their mother the estate

bequeathed to her by the will and vested in her as decided by the former decision of this Court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed. (1 Jarman, Wills, 5th ed., 827; 2 Jarman, Wills, 5 ed., 11, 13; Roper on Legacies, 618, 766, 767, 783; Ridgway v. Woodhouse, 7 Beav. 437, 49 Eng. Reprint 1134; Ill. Land & Loan Co. v. Bonner, 75 Ill. 315, 327; McFarland v. McFarland, 177 Ill. 208, 217.) Conditions subsequent are not favored in law (Davis v. Gray, 16 Wall. 203, 230), and are “construed beneficially, in order to save, if possible, the vested estate or interest; and if such condition prove illegal, or incapable of performance, whether as against good [83] morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift whether of real or personal property, relieved of the condition, becomes absolute in effect. (Harrison v. Harrison, 34 S. E. 455, 458.)

We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons, nor either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of

the provisions of the said will, which descended to and vested in the plaintiffs.

The agreed statement of facts is silent as to whether either of the sons is prepared to and desires to purchase the interest of the plaintiffs in the lands in question. Neither of the sons of the testator is a party to this submission. The defendant claims, in the event that it is held that the vested remainder which the mother of plaintiffs took under the will was not defeated by her death prior to the expiration of the lease, the right to defeat the interests of the plaintiffs by payment to them of the sum of \$5,000, by virtue of her having purchased the interest of each of the testator's sons. This contention fails under the conclusion reached. If the death of Mrs. Scott, mother of the plaintiffs, prior to the expiration of the lease did not make the condition subsequent by which the remainder vested in her by the will could be defeated impossible of performance, as we hold it did, then it would be necessary to decide whether or not the privilege given the sons, or one or more of them, [84] under the third paragraph of the will, to purchase the estate in remainder which vested in the daughters at the death of the testator, passed to the defendant by reason of the deeds from the sons to her. This would involve the consideration of the question as to whether the privilege given the sons, or one or more of them, of buying out the daughters was a mere personal privilege to be performed by the sons only. A study of the will shows clearly a manifest intent on the part of the testator that his three sons and six daughters should share

equally; that the sons, at the expiration of the lease, jointly should have the right of buying out the interests of the daughters if all of the sons were prepared to and desirous of so doing; but, if one or two of the sons should not be so prepared, and so desire, the son or sons so prepared and desirous, should have that right. It was a mere privilege accorded to the sons, or one or more of them, if their desires and ability to purchase should permit, of acquiring all the leased lands. The privilege granted seems personal, and no intention can be found in the will that the daughters should be obliged to sell their respective interests in the lands in question at the stated price of \$5,000 to any one other than the sons, or one or more of them. The condition upon which the remainder which vested in Mrs. Scott, mother of the plaintiffs, could be defeated having become impossible of performance by reason of her death, thus terminating the privilege granted the sons of buying her interest, and defeating the remainder which vested in her, it is unnecessary to determine whether or not that privilege could be exercised by an assignee of the sons.

A judgment may be prepared decreeing that the defendant has no right, title or interest in or to the undivided one-ninth interest in and to the lands described in the agreed statement of facts claimed by the plaintiffs as heirs of Catherine Haunani Scott, vested in the said plaintiffs in fee, and adjudging the plaintiffs to be the absolute owners in fee of said undivided one-ninth interest in [85] and to the

said lands, and it is so ordered.

(Signed) E. M. WATSON,

(Signed) RALPH P. QUARLES.

E. A. MOTT-SMITH, for Plaintiffs.

A. PERRY, for Defendant.

Dissenting Opinion of Robertson, C. J.

The clearly expressed intention of the testator Bertelmann are set forth in the former opinion of this court reported in 14 Haw. 378, 385, 386.

The clearly expressed intention of the testator was that the sons should have the right to acquire the whole of the leased land upon giving to the daughters what the testator evidently considered a fair equivalent for the interests devised to them. It was his will "that my lands shall befall in equal shares and interest upon my three sons"; that they "will have a right to buy the whole of my lands now leased to the K. S. Co."; and that "by doing so, they, my sons, or he, my son, will enter in full possession of all my lands, and their or his right and title will be undisputable" etc. Thus did the testator express a dominating intent. It being a lawful intent it is the duty of this Court to see that it is carried out. Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition subsequent, but a limitation. The condition precedent to be performed by the sons is that they should pay "to each one of the daughters or surviving daughters the sum of five thousand dollars." The third paragraph of the will, taken by itself, supports the view that the remainders of the daughters after the expiration of the lease would be defeated

during the [86] term of the lease. Upon a strict literal interpretation of that paragraph it would have to be held that the sons could acquire title to the whole land by paying \$5,000 to each of such daughters as might be living when the time came for the sons to exercise the right given them, i. e., between the date of the expiration of the lease and one year thereafter. Such literal interpretation is not followed, however, because it is not in harmony with the general intent of the testator as shown by the will as a whole, as held by this Court in the former case, that the daughters were intended to have vested estates in fee. That is, estates which would descend to their respective heirs. But this departure from the language used in the third paragraph, which is required by the entire context, should not be carried to such an extent as to defeat the primary and clearly expressed intent of the testator that his sons should have the right to acquire the whole land by paying for the interests given to the daughters and their heirs. The contingency of the death of a daughter before the expiration of the lease was not provided for. Yet in order to effectuate the intent manifested by the testator it must be held that as to the estate of a deceased daughter which has passed to her heirs the sons should have the right to pay those heirs the sum which the will stated should have been paid to that daughter had she lived. The primary intent of the testator having been ascertained from the will as a whole the language used in any particular paragraph must, if inconsistent with that intent, be made to bend to it.

“In case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one; and where in *a* such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator’s general intention as ascertained from all the provisions of the will, the general intention must prevail.” 40 Cyc. 1393. The general rule, which, it is [87] conceded, is well settled, that a condition precedent must be literally performed, should not be enforced in the case of a will when the intent of the testator would thereby be defeated. The general and primary intent was that the sons, or one or more of them, should have the whole land; the language used with reference to the condition upon which they should acquire it was the expression of a secondary and particular intent. The means was secondary to the end, and should yield or conform to it. To hold otherwise, it seems to me, is to sacrifice the substance to the shadow upon a narrow and technical view. This is not a case where the literal performance of a condition has become impossible. The condition precedent prescribed in the third paragraph of the will could be liberally performed, and as the agreed facts show, has been performed, notwithstanding the death of one of the daughters, by making the payments to the surviving daughters. Properly construed, however, the condition precedent which the testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment

to the surviving daughters only, but that they should pay the sum named for the interest given to each of the daughters and their heirs. The right to acquire the interests of the daughters was not, I think, a mere personal privilege which could not be assigned to and exercised by a vendee of the sons. In my opinion the judgment should be that the plaintiffs are seised in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of \$5,000.

(Signed) A. G. M. ROBERTSON. [88]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Walter W. Scott, A Minor, Janet M. Scott, a Minor, Rubena F. Scott, a Minor, and the Bishop Trust Company, Ltd., a Corporation, Guardian of the Estate of Said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, vs. Mary N. Lucas. Opinion. Filed June 13, 1916, at 1:30 P. M. (S) J. A. Thompson, Clerk. [89]

In the Supreme Court of the Territory of Hawaii.

October Term, 1915.

BEFORE THE JUSTICE OF SAID COURT.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LTD., a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,
Plaintiffs,

vs.

MARY N. LUCAS,

Defendant.

Judgment.

SUBMISSION ON CASE AGREED.

This cause having been submitted to this court upon agreed facts, under the statute, to obtain a decree quieting title to an undivided one-ninth interest in and to certain lands described in the submission of facts filed in said cause and this court having heretofore, to wit, on the 13th day of June, 1916, rendered and filed a decision in said cause that the defendant has no right, title or interest in or to said undivided one-ninth interest and that the plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, are the absolute owners in fee simple of said one-ninth interest:

Now it is ordered, adjudged and decreed that the plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, are the absolute owners as tenants in common in fee simple of an undivided

one-ninth share or interest of or in those certain lands, tenements and [90] hereditaments situated on the Island and County of Kauai, Territory of Hawaii mentioned, described and set forth in the schedule attached to the submission filed herein as Exhibit "A" thereto, that is to say:

All of the following tracts and parcels of land and other property situated on the Island of Kauai, to wit:

1. The Ahupuaa of Kahili containing an area of 1789 acres more or less; being the same premises described in Royal Patent — Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann, late of Pilaa, Kauai, now deceased, by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86, folios 220...

2. The Ahupuaa of West Waiakalua containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Henry Bertelmann by said deed.

3. The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4. All of that tract of land situated at Lepeuli, District of Koolau, Kauai, containing

an area of 102 acres more or less; being the same premises conveyed to said Christian Henry Bertelmann by deed of Wm. Worner, dated March 31, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folio 386, 387.

5. Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6. All kuleanas belonging to the said Christian Henry Bertelmann situated within or adjacent to the boundaries of any of the above-described premises and all other parcels and tracts of land upon the Island of Kauai owned by the said Christian Henry Bertelmann at the time of his death.

7. All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises.

8. All leases of any portion of said premises made by Christian Henry Bertelmann together with all rents, remainders and reversions of the same;

and that the defendant, Mary N. Lucas, has no right, title or interest in or to the said undivided one-ninth share or interest of or in said [91] lands and that the title of the plaintiffs thereto to the extent aforesaid be quieted as against the defendant.

Dated, Honolulu, T. H., July 25, A. D. 1916.

[Seal] (Signed) J. A. THOMPSON,
Clerk.

By the Court,
Approved:

(Signed) E. M. WATSON,
Associate Justice Supreme Court, Territory of
Hawaii. [92]

[Endorsed]: No. 927. In the Supreme Court of the Territory of Hawaii. October Term, 1915. Before the Justices of said Court. Walter W. Scott, a Minor, Janet M. Scott, a Minor, Rubena F. Scott, a Minor, and the Bishop Trust Company, Ltd., a corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, Plaintiffs, vs. Mary N. Lucas, Defendant. Submission on Case Agreed. Judgment. Filed July 25, 1916, at 10:58 A. M. J. A. Thompson, Clerk. [93]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE THE JUSTICE OF SAID COURT.
MARY N. LUCAS,

Defendant, Plaintiff in Error,
vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LTD., a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors, Plaintiffs, Defendants in Error.

Petition for Writ of Error and Supersedeas.

The above-named defendant, Mary N. Lucas, deeming herself aggrieved by the judgment of the Honorable the Supreme Court of the Territory of Hawaii entered and filed in said Supreme Court on

July 25,

or about ~~June 13~~, 1916, in a cause entitled

(S) J. A. T. Clerk. “Walter W. Scott, a minor, Janet M. Scott,

a minor, Rubena F. Scott, a minor, and the

Bishop Trust Company, Limited, a Corporation,

Guardian of the Estate of said Walter W. Scott,

Janet M. Scott and Rubena F. Scott, minors, Plain-

tiffs” (defendants in error herein), “vs. Mary N.

Lucas, defendant” (plaintiff in error herein), num-

bered and docketed in said court as No. 927, comes

now by Antonio Perry, her attorney, and hereby

humbly petitions said Supreme Court of the Terri-

tory of Hawaii for an order allowing said Mary N.

Lucas to prosecute a writ of error and have the same

allowed and issued from the United States Circuit

Court of Appeals for the Ninth Circuit to the said

Supreme Court of the Territory of Hawaii [94]

under and according to the laws of the United States

in that behalf made and provided, and that a tran-

script of the record, proceedings and documentary

exhibits upon which said judgment was made, duly

authenticated, may be sent to said United States Cir-

cuit Court of Appeals for the Ninth Circuit; and also

that an order may be made by this Honorable Court

fixing the amount of the bond which the said defend-

ant shall give and furnish upon said writ of error,

and ordering that upon the filing of such bond all proceedings relative to enforcement and execution of the judgment aforesaid and all other proceedings whatsoever in said cause in the Supreme Court of the Territory of Hawaii be suspended and stayed until the determination of said writ of error by the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner, the said Mary N. Lucas, shows that the said judgment was rendered in an action at law and that the amount involved, exclusive of costs, exceeds the value of five thousand (\$5,000) dollars.

Dated at Honolulu, Territory of Hawaii, this 25th day of July, 1916.

MARY N. LUCAS,
By Her Attorney,
(Sgd.) ANTONIO PERRY.

Affidavit of Antonio Perry.

City and County of Honolulu,
Territory of Hawaii,
United States of America,—ss.

Antonio Perry, being first duly sworn, on oath deposes and [95] says: That he is the attorney for the above-named petitioner, Mary N. Lucas; that he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge; and, further, that the amount involved in the cause aforesaid, exclusive of costs, exceeds the value of five thousand (\$5,000) dollars.

(Sgd.) ANTONIO PERRY.

Subscribed and sworn to before me this 25th day of July, 1916.

[Seal] (S) SHIRLEY B. FOSTER,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [96]

[Endorsed]: No. 927. Supreme Court Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott, et al., Plaintiffs, Defendants in Error. Petition for Writ of Error and Superseedeas. Filed July 25, 1916, at 11:45 A. M. (S) J. A. Thompson, Clerk. [97]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE THE JUSTICE OF SAID COURT.
MARY N. LUCAS,

Defendant, Plaintiff in Error,
vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LTD., a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,
Plaintiffs, Defendants in Error.

Assignment of Errors.

And now comes Mary N. Lucas, the defendant, plaintiff in error in the above-entitled cause, by Antonio Perry, her attorney, and says that in the record and proceedings in the above-entitled cause in the

Supreme Court of the Territory of Hawaii there is manifest error to the prejudice of said defendant, plaintiff in error, Mary N. Lucas, in this, to wit:

1. That, in the cause entitled “Walter W. Scott, a minor, Janet M. Scott, a minor, Rubena F. Scott, a minor, and the Bishop Trust Company, Limited, a corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, plaintiffs, vs. Mary N. Lucas, defendant,” and numbered and docketed in the Supreme Court of the Territory of Hawaii as No. 927, the said Supreme Court of the Territory of Hawaii erred in rendering and entering judgment for the said plaintiffs, now defendants in error herein, and against [98] the said defendant, now plaintiff in error herein, which said judgment was filed in said cause on or about July 25, 1916, decreeing and adjudging that “the plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, are the absolute owners as tenants in common in fee simple of an undivided one-ninth share or interest of or in those certain lands, tenements and hereditaments situated on the Island and County of Kauai, Territory of Hawaii mentioned, described and set forth in the schedule attached to the submission filed herein as Exhibit “A” thereto, that is to say:

All of the following tracts and parcels of land and other property situated on the Island of Kauai, to wit:

1. The Ahuquaa of Kahili containing an area of 1789 acres more or less; being the same premises described in Royal Patent — Land Com-

mission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann, late of Pilaa, Kauai, now deceased, by deed of A. S. Hartwell et al., Trustees, dated September 24, 1883, of record in the Hawaiian Registry of Deeds in Liber 86 folio 220.

2. The Ahupuaa of West Waiakalua containing an area of 332 40/100 acres more or less, being premises also conveyed to said Christian Henry Bertelmann by said deed.

3. The Ahupuaa of Pilaa containing an area of 1520 acres more or less; being the same premises described in Land Commission Award 8559B to W. C. Lunalilo, and conveyed to Christian Henry Bertelmann by deed of J. Mott-Smith et al., Trustees, dated February 5, 1878, of record in the Hawaiian Registry of Deeds in Liber 53, folio 284.

4. All of that tract of land situated at Lepeuli, District of Koolau, Kauai, containing an area of 102 acres more or less; being the same premises conveyed to said Christian Henry Bertelmann by deed of Wm. Worner, dated March 31, 1883, of record in the Hawaiian Registry of Deeds in Liber 79, folio 386-387.

5. Five undivided shares or parts of and in all of the land at said Kauai owned by the Moloaa Hui, and all privileges and benefits appertaining to the same.

6. All kuleanas belonging to the said Christian Henry Bertelmann situated within or adjacent to the boundaries of any of the above-

described premises and all other parcels and tracts of land upon the Island of Kauai owned by the said Christian Henry Bertelmann at the time of his death.

7. All streams of water and water rights upon or appurtenant to all and singular the above-mentioned premises. [99]

8. All leases of any portion of said premises made by Christian Henry Bertelmann together with all rents, remainders and reversions of the same :

and that the defendant, Mary N. Lucas, has no right, title or interest in or to the said undivided one-ninth share or interest of or in said lands and that the title of the plaintiffs thereto to the extent aforesaid be quieted as against the defendant," the said Mary N. Lucas.

2. That the said Supreme Court erred in holding that the said Mary N. Lucas does not own and has no right, title or interest in or to the undivided one-ninth interest in the lands referred to in the paragraph or article marked "Third" in the will of Christian Henry Bertelmann (which said will is set forth in the Agreed Statement of Facts or Submission in said cause and proceedings, No. 927 as aforesaid, and was and is the subject of construction in said cause and proceedings), and which said lands are mentioned and described in the said Agreed Statement of Facts or Submission joined in and filed by the parties plaintiffs and defendant in said Supreme Court in the cause aforesaid (No. 927) and which said one-ninth interest was and is in said cause and

proceedings claimed by the said plaintiffs, now defendants in error, as the heirs of Catherine Haunani Scott, the daughter of the said testator, Christian Henry Bertelmann, and the mother of said Walter W. Scott, Janet M. Scott and Rubena F. Scott.

3. That the said Supreme Court erred in rendering and in entering judgment for the said plaintiffs (now defendants in error) and against the said defendant (now plaintiff in error) decreeing and adjudging that the said plaintiffs are the absolute owners in fee of the undivided one-ninth interest in said lands, which said one-ninth interest and lands are referred to and described in paragraphs marked "1" and "2" hereinabove.

4. That the said Supreme Court erred in holding that the said plaintiffs are the absolute owners in fee of the undivided one-ninth interest in said lands, which said one-ninth interest and lands [100] are referred to and described in paragraphs marked "1" and "2" hereinabove.

5. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the said plaintiffs, now defendants in error, are the absolute owners in fee of the said one-ninth interest in certain lands, which said interest and lands are in paragraphs marked "1" and "2" hereinabove referred to and described, and that said plaintiffs' said one-ninth interest is not defeasible and cannot be acquired by the defendant, this plaintiff in error, upon and by payment by her, said defendant, to them, said plaintiffs, of the sum of five thousand (\$5,000) dollars within one year from and

after the expiration of the 25-years' lease referred to in Article "Third" and in other parts of the will of said Christian Henry Bertelmann, that is to say, within one year from and after November 1, 1915.

6. That the said Supreme Court of the Territory of Hawaii erred in holding and in entering judgment upon the theory and to the effect that the said plaintiffs (now defendants in error) have any right, title or interest in or to the lands referred to in the paragraph or article marked "Third" in the said will of Christian Henry Bertelmann.

7. That the said Supreme Court erred in holding and in entering judgment to the effect that the said defendant, Mary N. Lucas, plaintiff in error herein, has not the right to defeat the said alleged one-ninth interest of the said plaintiffs, nor defendants in error, and to acquire it for herself, said Mary N. Lucas, by and upon paying to them the sum of five thousand (\$5,000) dollars within one year from and after the expiration of the said twenty-five years' lease referred to in the paragraph or Article marked "Third" and in other parts of the will of the said Christian Henry Bertelmann.

8. That the said Supreme Court erred in holding that "where by a last will and testament a remainder in fee is vested in a devisee [101] subject to defeasance by a condition subsequent and prior to the performance of the condition such condition becomes impossible of performance, the vested remainder becomes absolute in the devisee and no longer subject to the defeasance provided for in the will" and in holding that the rule so announced and herein just

quoted has any application to the will of Christian Henry Bertelmann or to the facts of the case at bar.

9. That the said Supreme Court erred in holding, and in entering judgment upon the theory and to the effect, that under the will of the said Christian Henry Bertelmann, Catherine Haunani Scott, the mother of the plaintiffs, Walter, Janet and Rubena Scott, took a vested remainder in fee subject to be defeated by the payment to her by the sons of the said testator, Christian Henry Bertelman, or one or more of them, of the sum of five thousand (\$5,000) dollars within one year after the expiration of the lease and in failing to hold and enter judgment upon the theory and to the effect that the mother of the said plaintiffs was devised by the said will a contingent estate upon the conditions precedent that she survive the expiration of said 25-year lease and that the sons of the said testator, or one or more of them, should not pay to her the sum of five thousand (\$5,000) dollars within one year after the expiration of the 25-year lease in the said will mentioned.

10. That the said Supreme Court erred in holding that it was not at liberty to disturb the decision of the Supreme Court of the Territory of Hawaii reported in 14 Haw. 378, rendered July 29, 1902, in the case of Frank C. Bertelmann and another versus Susan Bertelmann Kahilina and others, in which said case neither the plaintiffs herein nor Catherine Haunani Scott, mother of the minor plaintiffs herein nor this plaintiff in error nor Christian Sylvester Bertelmann, one of the said testator's sons, nor

Beatrice, one of the said testator's [102] daughters, were parties.

11. That the said Supreme Court erred in holding that the said decision of the said Supreme Court of the Territory of Hawaii so rendered in the said case entitled Frank C. Bertelmann and another versus Susan Bertelmann Kahilina and others has become an established rule of property so far as the rights involved in the case at bar are concerned or at all.

12. That the said Supreme Court erred in holding that under the said will of the said Christian Henry Bertelmann a vested remainder was devised to the daughters and that the defeasance of said vested remainder depended upon a condition subsequent.

13. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the death of Mrs. Scott (Catherine Huanani Scott, daughter of the said testator), mother of the minor plaintiffs, defendants in error herein, prior to the termination of the 25-year lease aforesaid referred to in Article "Third" of the said will of said testator, rendered the condition subsequent, whereby the estate held by the court to have been vested in her (Mrs. Scott) could have been, but for her death at that time, divested, impossible of performance.

14. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the condition in Article "Third" of the said will of the said testator relating to the payment of five thousand (\$5,000) dollars by the son or sons required for its performance a payment to the

testator's daughter Catherine Haunani Scott personally and in her lifetime and that a payment, in all other respects valid and sufficient, to the children and heirs of Catherine Haunani Scott after her death, she having died prior to the termination of the 25-year lease in said will mentioned, could not be [103] and would not be a performance of the said condition or a compliance with its terms so as to defeat or to prevent the vesting of the one-ninth interest or any other right, title or interest in the children and heirs of the said Catherine Haunani Scott.

15. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the minor plaintiffs aforesaid inherited from their mother the estate in the lands in controversy vested in her by the will of her father, the said Christian Henry Bertelmann, freed from the alleged condition subsequent whereby the said estate so vested in their mother could be divested if their mother were now living.

16. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that neither the testator's sons nor any of them nor *any their* assignee can now defeat the estate which was devised to the mother of the said minor plaintiffs in her lifetime under the provisions of the will aforesaid and which estate, the said Supreme Court says, descended to and vested in the plaintiffs.

17. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the will aforesaid of the said

Christian Henry Bertelmann shows clearly a manifest intent on the part of the said testator that his three sons and six daughters should share equally.

18. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the right or privilege by the said will granted to the sons of the testator, and to one or more of them, to defeat the interests of the daughters of the testator by paying to each of the daughters within the time in the said will stated the sum of five thousand (\$5000) dollars and thereby to acquire for themselves, the said sons so paying, in fee simple absolute all of the lands mentioned in article "Third" of said [104] will "seems personal" and that no intention can be found in the will that the daughters should be obliged to sell their respective interests in the lands in question at the stated price of five thousand (\$5000) dollars to anyone other than the sons or one or more of them.

19. That the said Supreme Court erred in not holding and in failing to enter judgment upon the theory and to the effect that upon the facts stated in the Submission of Case Agreed, the same being the initial pleading in the aforesaid cause, No. 927, of Walter W. Scott and others above mentioned as plaintiffs, versus Mary N. Lucas as defendant, the said Mary N. Lucas is, as against the said plaintiffs and without making any payment of five thousand (\$5000) dollars to the said Catherine Haunani Scott or to the minor plaintiffs aforesaid as heirs of the said Catherine Haunani Scott, the sole and "undisputable" owner, i. e., the owner in fee simple abso-

lute, of all of the lands referred to in Article “Third” of the will aforesaid and of every interest in said lands, and the owner in fee simple absolute of all of the right, title and interest (S) A. P. which was devised to the said Catherine J. A. T. Haunani Scott under the will aforesaid ~~from~~ (Clerk. of the said testator.

20. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the minor plaintiffs aforesaid and their guardian have now no right, title or interest whatsoever in the lands referred to in said Article “Third” of the will aforesaid and no right, title or interest whatsoever in or to any payment to them of five thousand (\$5000) dollars or of any other sum by the testator’s three sons or any of them or by the said Mary N. Lucas, the assignee of the said sons of the testator.

21. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that even if the said minor plaintiffs inherited from their mother and have now an undivided one-ninth interest in the said lands referred to in [105] Article “Third” of said will, nevertheless, the said Mary N. Lucas can defeat all of their said one-ninth interest and all other, if any, their right, title and interest in the said lands acquired under said will by paying to them or to their legally authorized representatives the sum of five thousand (\$5000) dollars within the time prescribed in and by said Article “Third” of said will and that if the said Mary N. Lucas shall so pay to said minor

plaintiffs or to their legally authorized representatives said sum of five thousand (\$5000) dollars within the time aforesaid the said Mary N. Lucas can and will acquire for herself all of the right, title and interest of the said minor plaintiffs, originally held by said Catherine Haunani Scott under said will, in the lands referred to in said Article "Third" of said will, and can and will thereby, as against the plaintiffs aforesaid, render her title perfect to all of said lands in fee simple absolute.

22. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that the words of survivorship in the phrase "surviving daughters," wherever it occurs in Article "Third" of said will, refer to the death of the said testator and not to the expiration of the said 25-year lease.

23. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the words of survivorship in the phrase "surviving daughters," wherever it occurs in Article "Third" of said will, refer to the expiration of the 25-year lease in said article mentioned and do not refer to the death of said testator.

24. That the said Supreme Court erred in holding and in entering judgment upon the theory and to the effect that Catherine Haunani Scott was under the circumstances of the case one of the "surviving daughters" of the said testator within the meaning of that expression [106] as used in Article "Third" of said will.

25. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that Catherine Haunani Scott was not under the circumstances of the case one of the “surviving daughters” of the testator within the meaning of that expression as used in Article “Third” of said will.

26. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the condition imposed upon the sons under Article “Third” of the said will relating to the payment of five thousand (\$5000) dollars to each of the daughters in order that the sons might thereby become the “undisputable” owners of all of the lands mentioned in said Article “Third,” was and is, as to any interest devised to Catherine Haunani Scott, possible of performance in spite of the fact that the said Catherine Haunani Scott died before the expiration of the said 25-year lease.

27. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the interests of the sons of the testator, and each of them, under the said will and particularly under Article “Third” thereof, in and to the lands referred to in said Article “Third” were wholly assignable.

28. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the right or privilege of the sons of the testator, and each of them, to defeat, and to acquire for themselves, the interests of

the daughters of the testator and particularly the interest of Catherine Haunani Scott, in the lands referred to in Article "Third" of said will by paying the sum of five thousand (\$5000) dollars at the time and upon the other conditions in said Article "Third" mentioned, was assignable and could and can be exercised by the said Mary N. Lucas, the assignee [107] of the three sons of the said testator.

29. That the said Supreme Court erred in not holding and in not entering judgment upon the theory and to the effect that the right and privilege of the sons of the testator and each of them to defeat, and to acquire for themselves, the interest of the testator's daughter, Catherine Haunani Scott, and of her heirs after her by way of succession to her, by paying the sum of five thousand (\$5000) dollars to the said Catherine Haunani Scott or to her heirs within the time and upon the other conditions in said Article "Third" of said will mentioned, was assignable and could and can be exercised by the said Mary N. Lucas, the assignee of the three sons of the said testator.

WHEREFORE, the said Mary N. Lucas, plaintiff in error, prays that the judgment of said Supreme Court of the Territory of Hawaii be reversed and set aside and that the said Supreme Court of the Territory of Hawaii be ordered to enter judgment for and in favor of the said Mary N. Lucas, defendant and plaintiff in error, declaring that, as against the said plaintiffs, defendants in error herein, she is the sole owner, in fee simple absolute, of all of

the lands referred to in Article "Third" of the will of said Christian Henry Bertelmann, and that the said plaintiffs have no right, title or interest whatsoever in said lands or any of them, and in the alternative declaring, if the United States Circuit Court of Appeals for the Ninth Circuit shall hold that the said minor plaintiffs are now the owners of an undivided one-ninth interest in the said lands, that the said one-ninth interest so held by the said minor plaintiffs is subject to be defeated wholly and to be acquired by the said Mary N. Lucas upon her paying or tendering the sum of five thousand (\$5000) dollars to the said minor plaintiffs or to their legally [108] authorized representatives within one year from the expiration of the 25-year lease in the said will mentioned.

Dated, Honolulu, Territory of Hawaii, July 25, 1916.

MARY N. LUCAS,

By Her Attorney,

(Sgd.) ANTONIO PERRY. [109]

[Endorsed] No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott et al., Plaintiffs, Defendants in Error. Assignment of Errors. Filed July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk. [110]

In the Supreme Court of the Territory of Hawaii.

October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Plaintiffs, Defendants in Error.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Mary N. Lucas, of Honolulu, Oahu, Territory of Hawaii, as principal, and John F. Bowler and Samuel C. Dwight, both of said Honolulu, as sureties, are jointly and severally held and firmly bound unto Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, a Corporation, guardian of the estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, in the full and just sum of Five Hundred (\$500.00) dollars, to the payment whereof well and truly to be made unto the said Walter W. Scott, Janet M. Scott, Rubena F. Scott, and the Bishop Trust Company, Limited, a Corporation, Guardian of the estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, or their

executors, administrators, successors or assigns, we hereby jointly and severally bind ourselves and our heirs, executors and administrators firmly by these presents. [111]

The condition of this obligation is as follows:

WHEREAS, in the above-entitled cause, a petition has been filed for the allowance of a writ of error to have the judgment of the Supreme Court of the Territory of Hawaii, entered and filed in the above-entitled court and cause on or about July 25, 1916, and the proceedings in said cause prior thereto, reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and to have issued a supersedeas herein:

NOW, THEREFORE, if such writ of error and supersedeas shall issue according to the prayer of the petition in that behalf and if the said Mary N. Lucas, the above-bounden principal and plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs, if she fails to make her plea good, then this obligation shall be void,—otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF we, the said Mary N. Lucas, and John F. Bowler and Samuel C. Dwight hereunto set our hands and seals this 25th day of July, 1916.

(Sgd.) MARY N. LUCAS,

Principal.

(Sgd.) JOHN F. BOWLER,

Surety.

(Sgd.) SAMUEL C. DWIGHT,

Surety.

City and County of Honolulu,
Territory of Hawaii,—ss.

John F. Bowler and Samuel C. Dwight [112]
the above-named sureties, being first duly sworn, do
on oath depose and say, each for himself, that he is
a resident of Honolulu, Oahu, Territory of Hawaii,
and that he owns property located in said Honolulu,
not exempt from execution, which property is of the
value, over and above all of his debts and liabilities,
of twice the amount of the foregoing bond.

(Sgd.) JOHN F. BOWLER.

(Sgd.) SAMUEL C. DWIGHT.

Subscribed and sworn to before me this 25th day
of July, 1916.

[Seal] (Sgd.) SHIRLEY B. FOSTER,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

The foregoing bond is hereby approved, as to its
form, as to its amount and as to the sufficiency of its
sureties, this 25th day of July, 1916.

(Signed) E. A. MOTT-SMITH,
Attorney for the Plaintiffs, Defendants in Error.

The foregoing bond is hereby approved, as to its
form, as to its amount and as to the sufficiency of its
sureties, this 25th day of July, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice, Supreme Court, Territory of Hawaii.

[113]

[Endorsed]: No. 927. Supreme Court, Territory
of Hawaii. October Term, 1915. Before the Jus-
tices. Mary N. Lucas, Defendant, Plaintiff in Er-

ror, vs. Walter W. Scott et al., Plaintiffs, Defendants in Error. Supersedeas and Cost Bond on Writ of Error. Filed July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk. [114]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Plaintiffs, Defendants in Error.

Order Allowing Writ of Error and Supersedeas.

Upon reading and filing the foregoing petition for a writ of error, together with an assignment, presented therewith, of errors alleged to have occurred in the judgment of the Supreme Court of the Territory of Hawaii and in the proceedings in the trial of said cause prior thereto, IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Mary N. Lucas, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause on or about July 25, 1916,

and the proceedings in the trial of said cause prior thereto, and that the amount of the bond to be filed in this court by the said Mary N. Lucas in connection with the writ of error prayed for, be and the same is hereby fixed at Five Hundred (\$500.00) dollars; and **IT IS FURTHER ORDERED** that, upon the filing of an approved bond in said amount, all proceedings relative to enforcement and execution of the judgment aforesaid and all other [115] proceedings whatsoever in said cause in the said Supreme Court of the Territory of Hawaii shall be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H., July 25, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

An approved bond in the sum of Five Hundred (\$500.00) dollars, complying with the requirements hereinabove fixed and with the law, having been filed this 25th day of July, 1916, **IT IS HEREBY ORDERED** that all proceedings relative to enforcement and execution of the judgment hereinabove referred to and all other proceedings whatsoever in said cause in said Supreme Court of Hawaii be and they hereby are suspended and stayed until the determination of the aforesaid writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H., July 25, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [116]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott et al., Plaintiffs, Defendants in Error. Order Allowing Writ of Error and Supersedeas. Filed July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk. [117]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Justices of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme Court of the Territory of Hawaii, before you or some of you, between Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, a corporation, guardian of the estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, plaintiffs (defendants in error herein), and Mary N. Lucas, defendant (plaintiff in error herein), (Docket No. 927 of the Supreme Court of the Territory of Hawaii), a manifest error has happened, to the great damage of the said Mary N. Lucas, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the City of San Francisco, State of California, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 23d day of August next, that the record and proceedings aforesaid being inspected, the said justices of the said Circuit Court of Appeals may cause further to be done therein, to correct [118] that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord One Thousand Nine Hundred and Sixteen and of the Independence of the United States the One Hundred and Forty-first.

[Seal] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii.

The foregoing writ is hereby allowed, this 25th day of July, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [119]

[Endorsed]: No. 927. Mary N. Lucas, Defendant, Plaintiff in Error, v. Walter W. Scott, et al., Plaintiffs, Defendants in Error. Writ of Error. Filed July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk. [120]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss

To Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, and the Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, wherein Mary N. Lucas is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, Mary N. Lucas, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Due and proper service of the above citation and receipt [121] of a true copy thereof this 25th day

of July, 1916, is hereby admitted.

WALTER W. SCOTT, a Minor,
JANET F. SCOTT, a Minor,
RUBENA F. SCOTT, a Minor, and
The BISHOP TRUST COMPANY, LIM-
ITED, a Corporation,
Guardian of the Estate of said Walter W. Scott,
Janet M. Scott and Rubena F. Scott, Minors,
By Their Attorney,
(Signed) E. A. MOTT-SMITH. [122]

[Endorsed]: No. 927. Mary N. Lucas, Plaintiff
in Error, v. Walter W. Scott et al., Defendants in
Error. Citation on Writ of Error. Filed July 25,
1916 at 11:45 A. M. (S.) J. A. Thompson, Clerk.

Issued for service July 25, 1916, at 11:45 A. M.
(S.) J. A. Thompson, Clerk.

Returned July 31, 1916, at 9:50 A. M. (S.) J. A.
Thompson, Clerk. [123]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.
MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M.
SCOTT, a Minor, RUBENA F. SCOTT, a
Minor, and the BISHOP TRUST COM-
PANY, LIMITED, a Corporation, Guardian

of the Estate of said WALTER W. SCOTT,
JANET M. SCOTT and RUBENA F.
SCOTT, Minors,

Plaintiffs, Defendants in Error.

Direction for Service.

United States of America,
Territory of Hawaii,—ss.

To the High Sheriff of the Territory of Hawaii or
His Deputy; the Sheriff of the City and County
of Honolulu or His Deputy; the Sheriff of the
County of Kauai or His Deputy:

You are commanded to serve upon Walter W.
Scott, Janet M. Scott and Rubena F. Scott, minors,
and the Bishop Trust Company, Limited, Guardian
of the estate of said Walter W. Scott, Janet M. Scott
and Rubena F. Scott, minors, the Writ of Error and
Citation on Error in the above-entitled cause and
each and all of the other papers hereinbelow enu-
merated, to wit: [124]

Petition for Writ of Error and Supersedeas, with
affidavit of Antonio Perry;

Assignment of Errors;

Order Allowing Writ or Error and Supersedeas;
Supersedeas and Cost Bond on Writ of Error;

Order Extending Time for Preparation and Trans-
mission of Record;

Praecipe for Transcript;

~~Certificate of Clerk to Transcript of Record and Re-
turn to Writ of Error,~~

Direction for Service of Writ, Citation and other
papers;

Statement of Errors and Record Relied upon, addressed to the Clerk of United States Circuit Court of Appeals for Ninth Circuit;

Statement of Errors and Record Relied upon, addressed to defendants in error and their attorney.

And to so serve the said papers by delivering to each of the parties hereinabove named copies thereof and at the same time exhibiting the originals.

And make full return of your proceedings hereunder.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, 1916.

[Seal] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing Direction for Service is hereby authorized and allowed this 25th day of July, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. [125]

Return of Service of Papers on Writ of Error.

Executed the foregoing Direction for Service and served the following papers as follows:

By delivering a true and attested copy of:

The Writ of Error,

Citation on Error,

Petition for Writ of Error and Supersedeas with Affidavit of Antonio Perry,

Assignment of Errors,

Order Allowing Writ of Error and Superse-
deas,

Supersedeas and Cost Bond on Writ of Error,
Order Extending Time for Preparation and
Transmission of Record,

Praecipe for Transcript,

Direction for Service of Writ, Citation and
other papers,

Statement of Errors and Record Relied upon,
addressed to the Clerk of United States Circuit
Court of Appeals for Ninth Circuit.

Statement of Errors and Record Relied upon,
addressed to defendants in error and their at-
torney,

to each the following persons, to wit:

WALTER W. SCOTT, a minor, at Lihue,
District of Lihue, County of Kauai, T. H.

JANET M. SCOTT, a minor, and

RUBENA F. SCOTT, a minor, at Manini,
District of Kawaihau, County of Kauai, T. H.

and at the time showing them the originals of all of
the said documents, on the 26th day of July, 1916.

Dated, Lihue, T. H., July 26th, 1916.

[Seal] (Signed) WM. HENRY RICE,

Sheriff, County of Kauai, T. H. [126]

Acceptance of Service of Papers on Writ of Error.

Service of the aforesaid Writ of Error, Citation
on Error, and all the other papers by the foregoing
Direction for Service directed to be served, is hereby

admitted and accepted, this 25th day of July, 1916.

WALTER W. SCOTT,

JANET M. SCOTT, and

RUBENA F. SCOTT, Minors and the
BISHOP TRUST COMPANY, LIMITED, A
Corporation, Guardian of the Estate of
said Walter W. Scott, Janet M. Scott and
Rubena F. Scott, Minors,

Defendants in Error,

By Their Attorney,

(Signed) E. A. MOTT-SMITH.

WALTER W. SCOTT,

JANET M. SCOTT, and

RUBENA F. SCOTT,

Minors by the Guardian of their Estate,
The BISHOP TRUST COMPANY, LIMITED,

The Latter by

(Sgd.) E. A. MOTT-SMITH,

Its Vice-President.

And (Sgd.) Wm. SIMPSON,

Its Assistant Treasurer. [127]

[Corporate Seal]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott et al., Plaintiffs, Defendants in Error. Direction for Service With Return and Acceptance of Service. Filed and issued July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk.

Returned July 31, 1916, at 9:50 A. M.

(Signed) J. A. THOMPSON,

Clerk. [128]

In the Supreme Court of the Territory of Hawaii.

October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Plaintiffs, Defendants in Error.

Order Extending Time for Preparation and Transmission of Record.

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, IT IS HEREBY ORDERED that the plaintiff in error, Mary N. Lucas, and the Clerk of this court be and they hereby are allowed until and including the 15th day of September, 1916, within which time to prepare and transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as part of said record.

Dated at Honolulu, T. H., July 25, 1916.

[Seal] (Signed) A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [129]

This order is consented to July 25, 1916.

(Signed) E. A. MOTT-SMITH,
Attorney for Defendants in Error. [130]

[Endorsed]: No. 927. Supreme Court, Territory
of Hawaii. October Term, 1915. Before the Jus-
tices. Mary N. Lucas, Defendant, Plaintiff in Er-
ror, vs. Walter W. Scott et al., Plaintiffs, Defend-
ants in Error. Order Extending Time for Prepara-
tion and Transmission of Record. Filed July 25,
1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk.
[131]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ON WRIT OF ERROR TO THE SUPREME
COURT OF THE TERRITORY OF HAWAII.

MARY N. LUCAS,

Defendant and Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M.
SCOTT, a Minor, RUBENA F. SCOTT, a
Minor, and the BISHOP TRUST COM-
PANY, LIMITED, a Corporation, Guardian
of the Estate of said WALTER W. SCOTT,
JANET M. SCOTT and RUBENA F.
SCOTT, Minors,

Plaintiffs and Defendants in Error.

Statement of Errors and Record Relied Upon.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Mary N. Lucas, the plaintiff in error in the above-entitled cause, hereby states that in the above-entitled cause she intends to rely upon each and all of the errors assigned in the assignment of errors forwarded to this court with the writ of error by the clerk of the Supreme Court of the Territory of Hawaii, a copy of which said assignment of errors is hereto attached and is hereby made a part hereof; and hereby further states that she deems necessary for the consideration in this court of the errors assigned as aforesaid all of the record as certified and forwarded to this court with the original writ of error by the clerk of the Supreme Court aforesaid; [132] and that she will forthwith serve on the adverse parties herein a copy of this statement.

Dated, Honolulu, T. H., July 25, 1916.

MARY N. LUCAS,

By Her Attorney,

(Sgd.) ANTONIO PERRY. [133]

[Endorsed]: No. 927. United States Circuit Court of Appeals, Ninth Circuit. Mary N. Lucas, Defendant and Plaintiff in Error, vs. Walter W. Scott et al., Plaintiffs and Defendants in Error. Statement to Clerk of Above Court, of Errors and Record Relied Upon. Filed July 25, 1916, at 11:45 A. M. (S.) J. A. Thompson, Clerk Supreme Court of Hawaii. [134]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ON WRIT OF ERROR TO SUPREME COURT
OF THE TERRITORY OF HAWAII.

MARY N. LUCAS,

Defendant and Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M.
SCOTT, a Minor, RUBENA F. SCOTT, a
Minor, and the BISHOP TRUST COM-
PANY, LIMITED, a Corporation, Guardian
of the Estate of said WALTER W. SCOTT,
JANET M. SCOTT and RUBENA F.
SCOTT, Minors,

Plaintiffs and Defendants in Error.

**Notice of Service of Statement of Error and Record
Relied Upon on Writ of Error.**

STATEMENT OF ERRORS AND RECORD
RELIED UPON.

To the Above-mentioned Plaintiffs, Walter W.
Scott, a Minor, Janet M. Scott, a Minor, Rubena
F. Scott, a Minor, and the Bishop Trust Com-
pany, Limited, a Corporation, Guardian of the
Estate of Walter W. Scott, Janet M. Scott and
Rubena F. Scott, Minors, Defendants in Error,
and Their Attorney, E. A. Mott-Smith:

A. P.
(S) J. A. T.
Clerk, A. P.

Herewith I am serving upon you a copy
to be

of a statement ~~this day~~ forwarded to the
clerk of the above-entitled court for filing in said
court in the above-entitled cause in accordance with

the requirements of Section 8, Rule 23 of the above-entitled court.

Dated, Honolulu, T. H., July 25, 1916.

MARY N. LUCAS,
By Her Attorney,
ANTONIO PERRY. [135]

[Endorsed]: No. 927. United States Circuit Court of Appeals, Ninth Circuit. Mary N. Lucas, Defendant and Plaintiff in Error, vs. Walter W. Scott, et al., Plaintiffs and Defendants in Error. Statement to Defendants in Error of Errors and Record Relied upon. Filed July 25, 1916, at 11:45 A. M. (S) J. A. Thompson, Clerk Supreme Court of Hawaii. [136]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.
MARY N. LUCAS,

Defendant and Plaintiff in Error,
vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,
Plaintiffs, Defendants in Error.

Praeceptum for Transcript of Record.

To James A. Thompson, Clerk of the Supreme Court,
of the Territory of Hawaii:

You will please prepare a transcript of the record in this cause (said cause being entitled in the Supreme Court of the Territory of Hawaii, "Walter W. Scott, a minor, Janet M. Scott, a minor, Rubena F. Scott, a minor, and the Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, Plaintiffs, vs. Mary N. Lucas, Defendant,") to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore issued by said court and include in said [137] transcript the following pleadings, exhibits, proceedings, opinions, judgments and papers on file in said cause, to wit:

- (1) Copy of Submission upon Agreed Facts, filed February 18, with all the exhibits attached thereto, viz.:

Exhibit "A," Copy of Schedule of property belonging to Christian Henry Bertelmann, (late of Pilaa, Kauai), at the time of his death.

Exhibit "B," Copy of the Will of Christian Henry Bertelmann.

Exhibit "C," Copy of Deed, dated March 5, 1910, by Henry Godfrey Bertelmann to Mary N. Lucas recorded in the Office of the Registrar of Conveyances in Honolulu, Oahu, in Liber 332, pp. 16-18.

Exhibit "D," Copy of Deed, dated September 12, 1907, by Christian Sylvester Bertelmann to Mary N. Lucas, recorded in the office of said Registrar in Liber 292, pp. 498-500.

Exhibit "E," Copy of Mortgage, dated August 3, 1900, by Frank Charles Bertelmann to J. Alfred Magoon, recorded in the office of said Registrar in Liber 213, pp. 222-224, with assignment of mortgage by J. Alfred Magoon to Mary N. Lucas, dated July 11, 1902, and recorded in the office of said Registrar in Liber 213, pp. 223.

Exhibit "F," Copy of Mortgage, dated January 23, 1901, by Frank Charles Bertelmann to S. Kobayashi, recorded in the office of said Registrar in Liber 215, pp. 456-458.

Exhibit "G," Copy of assignment of mortgage, dated August 18, 1902, by S. Kobayashi to D. L. Peterson, recorded in office of said Registrar in Liber 215, p. 457.

Exhibit "H," Copy Assignment of Mortgage, dated August 28, 1902, by D. L. Peterson to Mary N. Lucas, recorded in office of said Registrar in Liber 215, page 457.

Exhibit "I," Copy of Mortgage, dated August 13, 1902, by Frank Charles Bertelmann to Mary N. Lucas, recorded in office of said Registrar in Liber 236, pp. 372-375.

Exhibit "J," Copy of Supreme Court Execution, dated December 16, 1902, for \$87.52, in

a cause entitled "Washington Mercantile Company, Limited, Plaintiff, vs. F. C. Bertelmann, Defendant." [138]

Exhibit "K," Copy of Deed, dated February 7, 1903, by Arthur M. Brown, High Sheriff of the Territory to Mary N. Lucas, recorded in office of said Registrar in Liber 248, pp. 82-84.

Exhibit "L," Copy of Deed, dated March 14, 1903, by Justine Bertelmann Smith to Mary N. Lucas, recorded in office of said Registrar in Liber 248, pp. 190-192.

Exhibit "M," Copy of Deed, dated May 18, 1903, by Mary Josephine Hattie Bertelmann Bannister to Mary N. Lucas, recorded in office of said Registrar in Liber 249, pp. 314-316.

Exhibit "N," Copy of Deed, dated October 12, 1904, by Beatrice Bertelmann Ross to Mary N. Lucas, recorded in office of said Registrar in Liber 258, pp. 427-429.

Exhibit "O," Copy of Deed, dated January 16, 1907, by Angeline K. Hogan to Mary N. Lucas, recorded in office of said Registrar in Liber 287, pp. 154-157, and

Exhibit "P," Copy of Deed, dated November 29, 1915, by Wilhelmina B. Baker to Mary N. Lucas, recorded in office of said Registrar in Liber 435, pp. 330-333.

- (2) Copy of Amendment to Submission, dated and filed April 22, 1916.
- (3) Copy of Opinions of the Justices of the Supreme Court of Hawaii, rendered June 13, 1916.
- (4) Copy of Judgment of the Supreme Court of Hawaii, entered July 25, 1916.
- (5) Copy of Petition for Writ of Error and Supersedeas, together with affidavit of Antonio Perry as to value, filed July 25, 1916.
- (6) Copy of Assignment of Errors, together with prayer for reversal, filed July 25, 1916.
- (7) Copy of Order allowing writ of error and supersedeas, filed July 25, 1916.
- (8) Copy of Supersedeas and Cost Bond on writ of error, filed July 25, 1916.
- (9) Copy of Writ of Error, filed July 25, 1916.
- (10) Copy of Citation on Writ of Error, together with acknowledgment of service thereof, filed July 25, 1916. [139]
- (11) Direction to ~~High~~ Sheriffs for Service of Citation and other papers,—together with ~~High~~
- (S) J. A. T. ^{Clerk.} Sheriff's Return of Service, and the acceptance of service.
- (12) Copy of Order Extending Time for Preparation and Transmission of Record.
- (13) Copy of Praecipe for Transcript with receipt attached.

You will further annex to and transmit with the record the original Writ of Error from the United

States Circuit Court of Appeals for the Ninth Circuit, filed July 25, 1916, and the original Citation filed July 25, 1916, with returns of service filed (S) J. A. T. ———— ~~1916~~, your return to the Writ of Error, under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., July 25, 1916.

Respectfully,

MARY N. LUCAS,

By Her Attorney,

ANTONIO PERRY. [140]

Acceptance of Service of Praecipe for Transcript of Record.

RECEIVED a copy of the foregoing Praecipe for Transcript this 25th day of July, 1916. The said Praecipe contains a complete, true and correct list of all the pleadings, exhibits, proceedings, opinions, judgments and papers filed in the Supreme Court of the Territory of Hawaii in the above-entitled cause originally brought and maintained in said court under the title of "Walter W. Scott, a minor, Janet M. Scott, a minor, Rubena F. Scott, a minor, and the Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, Plaintiffs, v. Mary N. Lucas, Defendant," and also of all writs, papers and proceedings issued, filed and had in said court under the above title of "Mary N.

Lucas, Defendant and Plaintiff in Error, v. Walter W. Scott, a minor, Janet M. Scott, a minor, Rubena F. Scott, a minor, and the Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, Plaintiffs and Defendants in Error, by way of securing a review by the Circuit Court of Appeals for the Ninth Circuit of the judgment of the Supreme Court of the Territory of Hawaii filed in the cause on or about July 25, 1916, and of the proceedings in the trial of said cause prior thereto. The defendants in error do not desire to have any other papers whatsoever forwarded from the said Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit upon or in connection with said writ of error. The aforesaid list and Praecipe are hereby approved.

Receipt of copies of each and all of the pleadings, exhibits and other papers enumerated in the foregoing Praecipe and thereby directed to be forwarded to the said Circuit Court of Appeals for the Ninth Circuit is hereby further admitted.

Dated, Honolulu, T. H., July 25, 1916.

(Signed) E. A. MOTT-SMITH,

Attorney for the Defendants in Error. [141]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott, et al., Plaintiffs, Defendants in Error. Praecipe for Transcript. Filed July 25,

1916, at 1:36 P. M. (Signed) J. A. Thompson, Clerk
Supreme Court. [142]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable the Justices of the Supreme
[Seal] Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the Territory of Hawaii, before you or some of you, between Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, a corporation, guardian of the estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, plaintiffs (defendants in error herein), and Mary N. Lucas, defendant (plaintiff in error herein), (Docket No. 927 of the Supreme Court of the Territory of Hawaii), a manifest error has happened, to the great damage of the said Mary N. Lucas, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals

for the Ninth Circuit, at the courtrooms of said court in the City of San Francisco, State of California, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 23d day of August next, that the record and proceedings aforesaid being inspected, the said justices of the said Circuit Court of Appeals may cause further to be done therein, to correct [143] that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States the one hundred and forty-first.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing writ is hereby allowed, this 25th day of July, 1916.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [144]

[Endorsed]: No. 927. Mary N. Lucas, Defendant, Plaintiff in Error, v. Walter W. Scott et al., Plaintiffs, Defendants in Error. Writ of Error. Filed July 25, 1916, at 11:45 A. M. J. A. Thompson, Clerk. [145]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To Walter W. Scott, Janet M. Scott, and Rubena F. Scott, Minors, and the Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Mary N. Lucas is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, Mary N. Lucas, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, 1916.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

Due and proper service of the above citation and receipt [146] of a true copy thereof this 25th day

of July, 1916, is hereby admitted.

WALTER W. SCOTT, a Minor,
JANET M. SCOTT, a Minor,
RUBENA F. SCOTT, a Minor, and
THE BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors,

By Their Attorney,

E. A. MOTT-SMITH. [147]

[Endorsed]: No. 927. Mary N. Lucas, Plaintiff in Error, v. Walter W. Scott et al., Defendants in Error. Citation on Writ of Error. Filed July 25, 1916, at 11:45 A. M. J. A. Thompson, Clerk.

Issued for service July 25, 1916, at 11:45 A. M. J. A. Thompson, Clerk.

Returned July 31, 1916, at 9:50 A. M. J. A. Thompson, Clerk. [148]

In the Supreme Court of the Territory of Hawaii,
October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian

of the Estate of Said WALTER W. SCOTT,
JANET M. SCOTT and RUBENA F.
SCOTT, Minors,

Plaintiffs, Defendants in Error.

Direction for Service of Papers on Writ of Error.

United States of America,

Territory of Hawaii,—ss.

To the High Sheriff of the Territory of Hawaii or
His Deputy; the Sheriff of the City and
[Seal] County of Honolulu or His Deputy; the
Sheriff of the County of Kauai or His
Deputy:

You are commanded to serve upon Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, Guardian of the estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, minors, the Writ of Error and Citation on Error in the above-entitled cause and each and all of the other papers hereinbelow enumerated, to wit: [149]

Petition for Writ of Error and Supersedeas, with
affidavit of Antonio Perry;

Assignment of Errors;

Order Allowing Writ of Error and Supersedeas;
Supersedeas and Cost Bond on Writ of Error;

Order Extending Time for Preparation and Transmission of Record;

Praecipe for Transcript;

Certificate of Clerk to Transcript of Record and Return to Writ of Error,

Direction for Service of Writ, Citation and other papers;

Statement of Errors and Record Relied upon, addressed to the Clerk of United States Circuit Court of Appeals for Ninth Circuit;

Statement of Errors and Record Relied upon, addressed to defendants in error and their attorney.

And to so serve the said papers by delivering to each of the parties hereinabove named copies thereof and at the same time exhibiting the originals.

And make full return of your proceedings hereunder.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of July, 1916.

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing Direction for Service is hereby authorized and allowed this 25th day of July, 1916.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [150]

Return of Service.

Executed the foregoing Direction for Service and served the following papers as follows:

By delivering a true and attested copy of:

The Writ of Error;

Citation on Error;

Petition for Writ of Error and Supersedeas
with Affidavit of Antonio Perry;

Assignment of Errors;

Order Allowing Writ of Error and Supersedeas;

Supersedeas and Cost Bond on Writ of Error;

Order Extending Time for Preparation and Transmission of Record;

Praecipe for Transcript;

Direction for Service of Writ, Citation and other papers;

Statement of Errors and Record Relied upon, addressed to the Clerk of United States Circuit Court of Appeals for Ninth Circuit;

Statement of Errors and Record Relied upon, addressed to defendants in error and their attorney,

to each of the following persons, to wit:

WALTER W. SCOTT, a minor, at Lihue,
District of Lihue, County of Kauhai,
T. H.

JANET M. SCOTT, a minor, and

RUBENA F. SCOTT, a minor, at Manini,
District of Kawaihau, County of Kauai,
T. H.

and at the same time showing them the originals of all of the said documents, on the 26th day of July, 1916.

Dated, Lihue, Kauai, T. H., July 26th, 1916.

[Seal]

WM. HENRY RICE,

Sheriff, County of Kauai, T. H. [151]

Acceptance of Service.

Service of the aforesaid Writ of Error, Citation on Error, and all the other papers by the foregoing Direction for Service directed to be served, is hereby admitted and accepted, this 25th day of July, 1916.

WALTER W. SCOTT,
JANET M. SCOTT, and
RUBENA F. SCOTT, Minors, and the
BISHOP TRUST COMPANY, LIMITED,
a Corporation, Guardian of the Estate of
said Walter W. Scott, Janet M. Scott,
and Rubena F. Scott, Minors,

Defendants in Error,

By their Attorney,

E. A. MOTT-SMITH,

WALTER W. SCOTT,
JANET M. SCOTT, and

RUBENA F. SCOTT, Minors,

By the Guardian of Their Estate,

THE BISHOP TRUST COMPANY, LIMITED,

The latter by

E. A. MOTT-SMITH,

Its Vice-President, and

WM. SIMPSON,

[Seal]

Its Assistant Treasurer. [152]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii, October Term 1915, Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, v. Walter W. Scott et al., Plaintiffs, Defendants in Error. Direction for Service

with Return and Acceptance of Service. Filed and Issued July 25, 1916 at 11:45 A. M. J. A. Thompson, Clerk.

Returned July 31, 1916 at 9:50 A. M.

J. A. THOMPSON,
Clerk. [153]

In the Supreme Court of the Territory of Hawaii,
October Term, 1915.

BEFORE THE JUSTICES OF SAID COURT.
MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of Said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Plaintiffs, Defendants in Error.

**Order Extending Time for Preparation and
Transmission of Record.**

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, IT IS HEREBY ORDERED that the plaintiff in error, Mary N. Lucas, and the Clerk of this Court be and they hereby are allowed until and including the 15th day of September, 1916, within which time to prepare and

transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as part of said record.

Dated at Honolulu, T. H., July 25, 1916.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [154]

This order is consented to, July 25, 1916.

E. A. MOTT-SMITH,
Attorney for Defendants in Error. [155]

[Endorsed]: No. 927. Supreme Court, Territory of Hawaii. October Term, 1915. Before the Justices. Mary N. Lucas, Defendant, Plaintiff in Error, vs. Walter W. Scott et al., Plaintiffs, Defendants in Error. Order Extending Time for Preparation and Transmission of Record. Filed July 25, 1916, at 11:45 A. M. J. A. Thompson, Clerk. [156]

In the Supreme Court of the Territory of Hawaii.
October Term, 1915.

BEFORE JUSTICES OF SAID COURT.

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and
the BISHOP TRUST COMPANY, LIM-

ITED, a Corporation, Guardian of the Estate
of Said WALTER W. SCOTT, JANET M.
SCOTT and RUBENA SCOTT, Minors,
Plaintiffs, Defendants in Error.

**Certificate of Clerk to Transcript of Record and
Return to Writ of Error.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error and in obedience thereto, the original of which said Writ of Error is herewith returned, being pages 143 to 145, both inclusive, of the foregoing transcript, and in pursuance of the praecipe to me directed, a copy whereof is hereto attached, being pages 137 to 142, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of [157] record, being pages 1 to 136, both inclusive, and DO HEREBY CERTIFY the same to be full, true and correct copies of the pleadings, exhibits, record, proceedings, opinions and final judgment which are on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii in the case entitled in the said court, "Walter W. Scott, a minor, Janet M. Scott, a minor, Rubena F. Scott, a minor, and the Bishop Trust Company, Limited, a Corporation, guardian of the estate of said Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minors, Plaintiffs, v. Mary N. Lucas, Defendant," and in said Supreme

Court numbered and docketed as Number 927.

I do further certify that the original Citation on Writ of Error, with Direction for Service, Return of Service and Acknowledgment of Service thereof, being pages 146 to 153, both inclusive, and the original Order Extending Time for Preparation and Transmission of Record, being pages 154 to 156, both inclusive, of the foregoing transcript of Record, are hereto attached and are herewith returned.

I also certify that the cost of the foregoing transcript of record is Thirty-eight and 95/100 (\$38.95) Dollars, and that said amount has been paid by Mary N. Lucas, the plaintiff in error herein.

In testimony whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, Oahu, Territory of Hawaii, this 1st day of August, A. D. 1916.

[Seal]

JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii. [158]

[Endorsed]: No. 2840. United States Circuit Court of Appeals for the Ninth Circuit. Mary N. Lucas, Plaintiff in Error, vs. Walter W. Scott, a Minor, Janet M. Scott a Minor, Rubena F. Scott, a Minor, and The Bishop Trust Company, Limited, a Corporation, Guardian of the Estate of Said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, Defendants in Error. Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 9, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ON WRIT OF ERROR TO THE SUPREME
COURT OF TERRITORY OF HAWAII.

MARY N. LUCAS,
Defendant, Plaintiff in Error,
vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and
the BISHOP TRUST COMPANY, LIM-
ITED, a Corporation, Guardian of the Estate
of Said WALTER W. SCOTT, JANET M.
SCOTT and RUBENA F. SCOTT, Minors.
Plaintiffs, Defendants in Error.

Direction Re Printing of Record in Appellate Court.
To the Clerk of the Above-entitled Court:

Lest the papers already filed in the above-entitled cause and which are being forwarded to you by the clerk of the Supreme Court of Hawaii do not make the matter sufficiently clear, permit me to add that we desire to have printed all of the record in the

case as the same is enumerated and designated in the Praecipe for Transcript and as forwarded to you by the clerk of the Supreme Court of Hawaii in answer to the Writ of Error. Neither side feels that the printing of less than the whole record forwarded to you will suffice.

Dated, Honolulu, T. H., July 26, 1916.

MARY N. LUCAS,
By Her Attorney,
ANTONIO PERRY.

Waiving the delay of ten days or any other delay which may be permitted to us, we also think that the whole record forwarded to you should be printed as the Record on Appeal.

Dated, Honolulu, T. H., July 26, 1916.

E. A. MOTT-SMITH,
Attorney for the Defendants in Error.

[Endorsed]: 2840. United States Circuit Court of Appeals, Ninth Circuit. Mary N. Lucas, Plaintiff in Error, vs. Walter W. Scott et al., Defendants in Error. Direction Re Printing of Record. Filed Aug. 9, 1916. F. D. Monckton, Clerk.

No. 2840

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and the
BISHOP TRUST COMPANY, LIMITED, a
Corporation, Guardian of the Estate of said
WALTER W. SCOTT, JANET M. SCOTT and
RUBENA F. SCOTT, Minors,

Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN
ERROR

UPON WRIT OF ERROR TO THE SUPREME
COURT OF THE TERRITORY OF HAWAII

Filed

SEP 12 1916

F. D. Monckton,

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY N. LUCAS,
Defendant, Plaintiff in
Error,

v.

WALTER W. SCOTT, a
Minor, JANET M. SCOTT,
a Minor, RUBENA F.
SCOTT, a Minor, and the
BISHOP TRUST COM-
PANY, LIMITED, a Cor-
poration, Guardian of the
Estate of said Walter W.
Scott, Janet M. Scott and
Rubena F. Scott, Minors,
Plaintiffs, Defendants
in Error.

Submission of Case
on Agreed Facts.

ON WRIT OF ERROR
TO THE
SUPREME COURT OF
HAWAII.

I.

STATEMENT OF CASE.

This case comes to this court on a writ of error to review the decision and judgment of the Supreme Court of Hawaii. It originated in the latter court and is a submission of questions in difference between the parties upon an agreed statement of facts. (Transcript of Record, p. 1.) The proceeding was authorized by and is in entire conformity with Hawaiian statutes (Revised Laws of Hawaii, 1915, Sections 2381 et seq.), which permit the submission di-

rectly to the local Supreme Court of issues of law arising upon facts as to which there is no dispute. Sections 2381, 2382 and 2383 read as follows:

“Sec. 2381. **TO SUPREME COURT; AFFIDAVIT.** Parties to a question in difference which might be the subject of a civil action in the circuit court or supreme court may, without action, agree upon a case containing the facts upon which a controversy depends and present a submission of the same to the justices of the supreme court either in term time or in vacation; but it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties; *Provided*, however, that the justices of the supreme court may in their discretion require the case to be first submitted to a circuit judge at chambers, subject to appeal.

“Sec. 2382. **JUDGMENT IN WRITING.** The justices, or a majority of them, shall thereupon hear and determine the case, and render judgment thereon, in writing, as if an action were depending.

“Sec. 2383. **ENTRY OF JUDGMENT; RECORD.** Judgment shall be entered in such case, as in ordinary civil actions. The case, the submission, and the written decision, shall constitute the record.”

The necessary affidavit was filed and the Supreme Court entertained jurisdiction, without requiring the case to be first submitted to a circuit judge at chambers, and subsequently filed its decision and its formal judgment.

The agreed facts are substantially as follows:

One Christian Henry Bertelmann of Pilaa, Kauai, Territory of Hawaii (who will be hereinafter called “the testator”), died at Pilaa on or about February 15, 1895, being at the time of his death seized in fee

of certain parcels of land which are described in Exhibit "A" attached to and made a part of the submission (Transcript of Record, p. 17), the title to which is the subject for adjudication in this case. He also owned other property, not involved in the present controversy. He left surviving him three sons, Frank, Henry and Christian, and six daughters, Catherine, Angeline, Wilhelmina, Justine, Josephine, and Beatrice. Catherine died on or about September 10, 1905, leaving surviving her three children, Walter W. Scott, Janet M. Scott and Rubena F. Scott, who are the plaintiffs in this case. The remaining children, both sons and daughters of the testator, are still living. Frank Scott, the husband of Catherine and father of the three plaintiffs, died in January, 1908. Susan C. Bertelmann, widow of the testator, died in September, 1915. The Bishop Trust Company, Limited, is the duly appointed guardian of the estate of the three minors, defendants in error.

Christian Henry Bertelmann left a will, executed December 12, 1891, a copy of which is made a part of the submission. (Transcript, p. 19.) This will, duly admitted to probate on or about April 18, 1895, contained certain devises in favor of the children, and certain of these devises are to be the subjects of construction in this case. The defendant, Mary N. Lucas, has acquired, by various conveyances, all of the right, title and interest of the three sons of the testator acquired by them under the will of their

father in and to the property referred to under article "Third" of the will. She has also acquired, by various other conveyances, all of the right, title and interest of Justine, Josephine, Beatrice, Angeline and Wilhelmina, daughters of the testator under the will of their father in and to the property mentioned in the same article "Third." These deeds of the sons were joined in by their wives by way of releasing their dower, and those of the daughters were joined in by their husbands by way of showing their assent to the deeds of the wives as required by Hawaiian law. A copy of each of the conveyances referred to is made a part of the submission. A complete list of these deeds to Mary N. Lucas with dates of execution and reference to the printed record follows:

Deed of Frank's Interest, February 7, 1903, pp. 34 to 55;

Deed of Justine's Interest, March 14, 1903, p. 55;

Deed of Josephine's Interest, May 18, 1903, p. 59;

Deed of Beatrice's Interest, October 12, 1904, p. 63;

Deed of Angeline's Interest, January 16, 1907, p. 67;

Deed of Christian's Interest, September 12, 1907, p. 29;

Deed of Henry's Interest, March 5, 1910, p. 25;

Deed of Wilhelmina's Interest, November 29, 1915, p. 71.

November 1, 1890, the testator leased to the Kilauea Sugar Company, an Hawaiian corporation, all of the lands and other property described in Exhibit

“A” (Tr., p. 17) and including all of the lands and other property referred to in article “Third” of the will “for and during the term of twenty-five years from the first day of November, 1890, fully to be complete and ended.” This lease was not at any time revoked, cancelled or surrendered or its term in any way shortened. It continued in operation for its full term of twenty-five years, until November 1, 1915. This is the same “twenty-five years’ lease” referred to by the testator in his will. The period of one year mentioned in Article “Third” of the will is, therefore, still running and will expire on November 1, 1916.

Articles “Third” and “Fourth” of the will are quoted hereinafter. The controversy is as to the construction of Article “Third.” The contention of the defendants in error is that the words “surviving daughters” in that article relate to the time of the testator’s death; that the daughter Catherine who survived the testator and died before November 1, 1915, the expiration of the lease, was, therefore, a “surviving daughter” within the meaning of that article; that under the will a vested estate, a one-ninth interest, was devised to her which upon her death descended to her three children, the present plaintiffs; that although if Catherine had survived the expiration of the lease her interest could have been defeated by the payment of five thousand (\$5000.00) dollars to her, still that same interest in her children cannot now be defeated because the condition has by an act of God (her death before the

expiration of the lease) become impossible of performance and that, therefore, the three children now own an undivided one-ninth interest in the lands mentioned in Article "Third" of the will and that interest is indefeasible by Mary N. Lucas, the assignee of the three sons, or by anyone else.

The contention of the plaintiff in error, on the other hand, is that the expiration of the lease, to wit, November 1, 1915, and not the death of the testator, is the period of survivorship referred to in the phrase "surviving daughters" used in Article "Third" of the will; that, therefore, the daughter Catherine, who died before November 1, 1915, although after the testator, is not a "surviving daughter" within the meaning of Article "Third" of the will; that the devise of one-ninth to Catherine was not of an estate which vested on the testator's death, but was contingent upon her survivorship of the lease and upon non-payment to her at or within one year after the expiration of the lease of the sum of \$5000 by the three sons or one or more of them; that whether the devise to Catherine was of a vested estate or was contingent in its nature, the condition, whether it was a condition of defeasance or a condition of vesting, was one and the same condition only and permitted the sons or one or more of them to pay the \$5000 to Catherine or her heirs within the time stated and thus bring into full operation the devise to them (the sons) of any interest which might otherwise have gone to Catherine; that, Catherine not having survived the expiration of the lease,

the will does not require of the sons or any of them that they pay \$5000 to defeat the interest which would otherwise have gone to Catherine and that the payments to all of the other daughters by the sons was a complete performance of the condition; that the children of Catherine have now no right, title or interest in the property mentioned in Article "Third" of the will and that the plaintiff in error, the assignee of the three sons, is now the sole owner, the "undisputable" owner as the will calls it, of all of the said lands without making any payment to the children of Catherine of \$5000 or any other sum; and that even though the correct construction of the will is that the death of the testator was the period of survivorship referred to in Article "Third" and that, therefore, Catherine was a "surviving daughter," and even though the devise to her was of an interest which vested upon the testator's death and descended to her three children, nevertheless, the interest of the three children was subject to the same quality of defeasibility upon payment to them by the sons or one or more of them of \$5000 and that, therefore, even under these assumptions the plaintiff in error is now entitled to defeat the one-ninth interest of the children by payment to them before November 1, 1916, of the sum of \$5000.

These contentions were all advanced before the Supreme Court of Hawaii and are the contentions before this court. The opinion below was by a divided court, Chief Justice Robertson dissenting. The majority held (Tr., p. 81) that the death of the tes-

tator was the period of survivorship referred to and that Catherine was a “surviving daughter”; that the devise to her was of a vested interest, defeasible upon the condition stated, and that consequently the condition was a condition subsequent; that upon her death her one-ninth interest descended to her three children; that conditions subsequent must be strictly construed; that the condition named in Article “Third” required as one of its elements the payment of the \$5000 *to Catherine personally in her lifetime*; that the payments of \$5000 were not to be made until at and after the expiration of the lease; that by reason of Catherine’s death prior to the expiration of the lease, the condition of defeasance became impossible of performance and that the case stands, therefore, as though there were no condition of defeasance; that Catherine’s children now own an undivided one-ninth interest in the lands mentioned in Article “Third” and that Mary Lucas, the assignee of the sons, has not the right to defeat that interest upon payment of \$5000. The majority also said that “the privilege granted” to the sons to pay the \$5000 to each daughter and thus defeat the interests of the latter “seems personal” and non-assignable by the sons.

Chief Justice Robertson held (Tr., p. 90) that the devise to Catherine was a conditional limitation rather than an estate upon a condition subsequent and that the dominating intent of the testator was that “the sons should have the right to acquire the whole of the leased land on giving to the daughters

what the testator evidently considered a fair equivalent for the interests devised to them"; that that was a lawful intent which should be carried out by the court; that in order to effectuate that intent it should be held that "as to the estate of a deceased daughter which has passed to her heirs," the sons have a right to pay those heirs the sum which the will stated should have been paid to the daughter had she lived; that properly construed "the condition precedent which the testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment to the surviving daughters only but that they should pay the sum named for the interest given to each of the daughters and their heirs," and that "the right to acquire the interests of the daughters was not a mere personal privilege" but was assignable and could be exercised by a vendee of the sons. His conclusion was that the judgment should be that the defendants in error "are seized in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of \$5000."

The formal judgment (Tr., p. 94) was to the effect that the defendants in error are the owners of an undivided one-ninth interest in the lands described in Article "Third" and that the plaintiff in error has no right, title or interest to the said one-ninth. It is to this judgment that the present writ of error is directed.

It should be added perhaps that there is a stipu-

lation in the original pleading or submission that if the court shall be of the opinion, after entering into consideration of the case, that some material fact necessary to a decision is not agreed upon or recited in the submission or that in matter of form the submission is defective, the parties shall be given an opportunity to amend the submission so as to correct any defect so found. (Tr., p. 16.) In other words, both parties are desirous of a decision based upon the merits and not upon any technical omission of theirs to state that which should have been stated. In pursuance of this stipulation, an amendment to the original submission was filed in the Supreme Court of Hawaii. (Tr., p. 76.)

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The plaintiff in error relies upon each and all of the errors set forth in the assignment of errors on file herein. (Tr., p. 100.) They are as follows:

1, 3 and 4. That the lower court erred in holding and in rendering the judgment above recited (Tr., p. 94) to the effect that Catherine's children are now the owners of a one-ninth interest, indefeasible by any act of the plaintiff in error, and that the latter has no right or claim to that one-ninth interest.

2. That the court erred in holding that Mary N. Lucas has no right, title or interest in or to the one-

ninth interest held as above to belong to the three children.

5 and 7. That the court erred in holding and in rendering judgment upon the theory and to the effect that Catherine's three children are the absolute owners in fee of a one-ninth interest in the lands referred to in Article "Third" of the will of Bertelmann and that the children's said title is not defeasible and cannot be acquired by the plaintiff in error upon payment by her to the children or their guardian of the sum of \$5000 within one year from and after the expiration of the 25 years' lease referred to in the will.

6. That the court erred in holding that the said three children have now any right, title or interest in the lands.

8. That the court erred in holding that where by a last will a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent, and the condition becomes impossible of performance, the vested remainder is freed from the condition; and in holding that this rule has any application to the case at bar.

9. That the court erred in holding and in rendering judgment to the effect that under the will of Christian Henry Bertelmann his daughter Catherine took a vested remainder in fee subject to defeasance and in failing to hold and to render judgment to the effect that the interest devised to Catherine was contingent upon the conditions precedent that she survive the expiration of the 25-year lease and that the

sons of the testator fail to pay to her \$5000 within one year after the expiration of the lease.

10 and 11. That the court erred in holding that it was not at liberty to disturb the decision in the case of *Bertelmann v. Kahilina*, reported in 14 Haw. 378, a case in which neither the present plaintiffs nor Catherine nor the testator's son Christian nor his daughter Beatrice were parties, and that the said decision in *Bertelmann v. Kahilina* has become an established rule of property so far as the rights involved in the case at bar are concerned or at all.

12. That the court erred in holding that under the said will, a vested remainder was devised to each of the daughters and that the defeasance of the remainder depended upon a condition subsequent.

13. That the court erred in holding that the death of Catherine prior to the termination of the 25-year lease rendered the condition subsequent whereby the estate, said by the court to have been vested in Catherine, could have been but for her death at that time divested, impossible of performance.

14. That the court erred in holding and in rendering judgment upon the theory that the condition in Article "Third" of the will relating to the \$5000 payments by the sons required for its performance a payment to Catherine personally and that a payment in all other respects valid and sufficient to Catherine's children and heirs after her death would not be a performance of the condition and would not defeat or prevent the vesting of the one-ninth interest in the three children.

15. That the court erred in holding and in rendering judgment to the effect that Catherine's three children inherited the one-ninth interest from their mother freed from the condition of defeasance which, as it held, attached to their mother's estate during her lifetime.

16. That the court erred in holding and in rendering judgment to the effect that neither the testator's sons nor any one or more of them, nor any their assignee, can now defeat the one-ninth interest which, as it held, was devised to Catherine under the said will and descended to and became vested in her three children.

17. That the court erred in holding and in rendering judgment to the effect that the said will "shows clearly a manifest intent" on the part of the testator "that his three sons and six daughters should share equally."

18. That the court erred in holding that the right or privilege granted by the will to the sons and to one or more of them to defeat the interests of the daughters by making the payments stated and thereby to acquire for themselves, the sons so paying, in fee simple absolute all of the lands mentioned in Article "Third" of the will "seems personal" and that "no intention can be found in the will that the daughters should be obliged to sell" their interests at \$5000 "to any one other than the sons or one or more of them."

19. That the court erred in not holding that upon the agreed facts the plaintiff in error is as against

Catherine's children and without making to Catherine or to her children any payment of \$5000, the sole and "undisputable" owner, i. e., the owner in fee simple absolute of all of the lands in question and of all of the right, title and interest therein which, under circumstances other than those existing, might have passed to Catherine.

20. That the court erred in not holding that Catherine's children and their guardian have now no right, title or interest in the lands in question or in or to any payment of \$5000 by the testator's sons or any of them or by the plaintiff in error, their assignee.

21. That the court erred in not holding that even if Catherine's children inherited from her and have now a one-ninth interest in the lands in question, nevertheless Mary Lucas has a right to defeat all of their interest and to acquire it for herself by paying or tendering to them or their guardian the sum of \$5000 within the time prescribed in Article "Third" of the will and that if Mary Lucas shall make said payment to said children within said time she can and will acquire for herself all of the right, title and interest of said children and can and will thereby as against them render her title perfect to all of the lands in question in fee simple absolute.

22 and 23. That the court erred in holding that the words of survivorship in the phrase "surviving daughters" wherever it occurs in Article "Third" of the will refer to the death of the testator, and in not

holding that they refer to the expiration of the 25-year lease.

24 and 25. That the court erred in holding that under the circumstances of the case, Catherine was one of the "surviving daughters" within the meaning of Article "Third," and in not holding that under the circumstances of the case she was not one of the "surviving daughters."

26. That the court erred in not holding that the condition imposed upon the sons under Article "Third" of the will relating to the payment there mentioned to each of the daughters was and is, as to any interest devised to Catherine, possible of performance in spite of the fact that Catherine died before the expiration of the lease.

27. That the court erred in not holding that the interests of the sons of the testator and each of them under the will, and particularly under Article "Third" thereof, in the lands in question were wholly assignable.

28. That the court erred in not holding that the right or privilege of the sons and each of them to defeat and to acquire for themselves the interests of the daughters, and particularly Catherine's interest in the lands in question, by making the payments mentioned in Article "Third" was assignable and could and can be exercised by Mary N. Lucas, the assignee of the three sons.

29. That the court erred in not holding that the right and privilege of the sons and each of them to defeat and to acquire for themselves the interest of

Catherine and of her heirs after her by way of succession to her by paying \$5000 to Catherine or to her heirs within the time prescribed and upon the other conditions named in Article "Third" was assignable and could and can be exercised by Mary Lucas, the assignee of the three sons of the said testator.

III.

ARGUMENT.

1.

NO UNUSUAL WEIGHT ATTACHES TO THE MAJORITY OPINION APPEALED FROM.

In entering upon the argument it is respectfully urged that there is nothing in the nature of this case, in its facts or in its law, which renders it incumbent upon this court to accept the decision appealed from or any views there expressed as binding upon this court or as entitled to some unusual degree of weight. There is nothing peculiarly Hawaiian in the law involved, whether written or unwritten. The facts could all as well have occurred on the mainland of the United States. The will under consideration could as well have been drawn and probated on the mainland and it can as well be construed there. The Supreme Court of Hawaii possessed no peculiar advantages in the decision of the case, and this appellate court is in as advantageous a position as the lower court was to determine all the issues involved.

The act of Congress gives us the right to a complete review at the hands of this court of the decision appealed from and to the views and the decision of the members of this court.

2.

THE DOCTRINE OF *STARE DECISIS* AND THAT OF *RES JUDICATA* INAPPLICABLE IN FAVOR OF THE KAHILINA DECISION.

In 1902, in the case of *Bertelmann v. Kahilina*, the opinions in which are reported in 14 Haw. 378, two of the testator's (Christian Henry Bertelmann's) sons, Frank and Henry, his widow, Susan B. Kahilina, and four of his daughters, Justine, Angeline, Wilhelmina and Hattie, joined in a submission under the statute upon an agreed statement of facts, the son Christian and the daughters Beatrice and Catherine not being parties. In that case the claim of the two sons was that they owned under the will two undivided thirds in fee simple of the estate; the claim of the four daughters was that they and the two sons alike owned an undivided one-ninth each; and the question submitted was what right, title or interest each of the six parties had under the will (14 Haw. 387). That was about thirteen years before the expiration of the 25-year lease referred to in Article "Third" of the will. The court, with one of its three justices dissenting, held that "the widow took a life estate in one-third the land, subject to be divested upon the performance of the conditions

prescribed in the third item, in which case she would thereafter have a fixed sum of \$2000 a year, which would be a charge on the land," and that "the children took, subject to the widow's interest, equal estates until the expiration of the lease, with vested remainders in fee, the former merging in the latter so as to make present vested estates in fee, defeasible as to the interests of the daughters and shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent executory devises as to such interests." The dissenting opinion was that the sons under clause "Third" took a contingent remainder or contingent executory devise, contingent upon survival of the expiration of the lease and upon their ability and willingness to pay \$5000 to each of the surviving daughters; that all that was devised to the "surviving daughters" in the event of performance by the sons was the sum of \$5000 each; and that in the event of failure of the contingencies of survivorship of and payment by the sons, each of the nine children would take one-ninth of the estate, the heirs of any child then deceased taking its parent's share by right of representation.

The contentions of the present defendants in error and the rulings of the two justices of the Supreme Court of Hawaii in their majority opinion now under review, appear to be based very largely upon the ruling of the majority in *Bertelmann v. Kahilina*. In the case at bar the majority even says that the former decision "has become an established rule of

property so far as the rights here involved are concerned" and that it "does not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years." There is no evidence whatever in this record that the Kahilina decision has been acted upon for fourteen years or for any other period of time or at all. There is no evidence whatever that anyone either a party or not a party to that case has ever acted or omitted to act in reliance upon that decision. This is a submission upon agreed facts and no evidence of any kind has been introduced in the case. The statement of agreed facts contained not a word showing any reliance upon that decision by anyone. The only transactions in the property of this estate disclosed by the record are those of the deeds executed to the plaintiff in error and set forth on page 4 of this brief. There is nothing in any of these transactions to show reliance upon the majority opinion in the Kahilina case any more than they show reliance upon the minority opinion. Those sales, deeds and purchases to and by Mary Lucas are consistent with both the majority and minority opinions. Whether the interests of the sons and those of the daughters were vested or contingent they were assignable. Whether they were vested or contingent the grantors could well have regarded it as good business to sell and the grantee could well have regarded it as good business to buy. Whether they were vested or contingent, whether the condition named in Article "Third" was subsequent or precedent the grantee could well have

proceeded upon the theory that she could later acquire all outstanding interests and thus complete the title in herself. Those transactions indicate with as much clearness, no more and no less, that all of the parties to them regarded the dissenting opinion as worthy of attention as that they regarded the majority as conclusively and finally stating the law.

Nor is there any room for the presumption that the Kahilina decision has been so acted upon. That decision did not enunciate any principle capable of general application. All that was there held was that upon the language used in this particular will certain estates were devised; and before that ruling could be applied or acted upon with reference to property other than that derived under this particular will, the language would have to be substantially duplicated in some other will or deed,—something which is extremely unlikely to have occurred since the rendition of that decision.

Not only upon the facts but upon the law the doctrine of *stare decisis* cannot be successfully invoked in this case in aid of an adherence to the decision in the Kahilina case. In addition to the considerations already referred to, it is to be noted that the Kahilina decision stands alone in Hawaii in the announcement of the views there stated. Ordinarily the doctrine applies only when there has been a series of decisions to the same effect. The reason is that there is less likelihood of error when the subject has been many times considered and the same conclusion always reached. Again, the one decision was by a di-

vided court and by a bare majority of one. The Supreme Court of Hawaii consists and at that time consisted of only three members. Under those circumstances of a decision, the first upon the point, by a divided court and the bare majority of one, the thought naturally arises of the possibility of the majority having erred and business men should be and are more cautious in acting upon the prevailing opinion. Again, the maxim is not imperative, "not ironclad" as some writers express it. The court looks always to the greatest permanent good of the community which it is serving. Its effort always is to declare sound law only and it will not consciously follow an erroneous decision unless compelling reasons are presented why it should do so. It is not shown that any real-estate titles would be affected by departing from the views expressed in the Kahi-lina case and if the same liberty may be accorded us as was exercised by the court below, of going outside of the record, it may be said that we are unaware of any action having been taken in Hawaii upon reliance upon the majority opinion in the Kahi-lina case and that we believe none such has been taken. Further, the point decided in that case is a controverted one and one upon which something can be said upon both sides. Again, the point now before the court was not before the court in the Kahi-lina case. The court was not then asked to consider and did not consider just what the condition in Article "Third" of the will was, or what the correct definition of "surviving" daughters was or who the

non-shortcoming sons were, or whether the heirs of a daughter who died before the expiration of the lease were entitled to \$5000, or whether the non-shortcoming sons were obligated to pay to such heirs. A consideration of all of these points is inevitably involved in the determination of the nature and in the proper classification of the estates devised to the daughters and to the sons respectively.

In support of our contention of the inapplicability of the doctrine of *stare decisis* under the circumstances, see for example:

11 Cyc. 745, 755, 756;

26 A. & E. Ency. 166-168;

Young v. Downey, 150 Mo. 331.

For all of the foregoing reasons, it is submitted that there is no duty whatever to follow the decision in the Kahilina case in so far as the doctrine of *stare decisis* is concerned.

The claim that "no question can now be raised as to the kind of interest which Catherine took under the will" because already decided in the Kahilina case is unfounded. In the Kahilina case neither Christian, one of our grantors, nor Catherine herself nor Beatrice was a party. Catherine was not bound by the decision, her heirs were not bound and we are not bound. The Kahilina case is not *res judicata* in this case. The question as between vested interests and contingent interests is open in so far as that point is concerned, but is, as will be argued later, immaterial.

THE MAJORITY DECISION IN THE KAHILINA CASE WAS INCORRECT.

The devise to the daughters was not of a vested estate upon a condition subsequent but, with the sons, of alternative contingent remainders upon a condition precedent.

In the first place, even if viewed as vested, the estate devised to the daughters is, as pointed out by Chief Justice Robertson in his dissenting opinion in this case, a conditional limitation rather than an estate upon condition subsequent. The distinction between the two classes of estates is clear. In a conditional limitation the happening or failure to happen, as the case may be, of the condition marks immediately and of itself the termination of the estate granted or devised; whereas, in an estate upon a condition subsequent the mere happening or failure to happen of the condition does not defeat the estate. It still remains optional with the grantor or his heirs or the heirs of the testator to take advantage of the breach of the condition and to enforce the defeat of the original estate and the reverter to the grantor, his heirs or the heirs of the testator as the case may be. The provision for re-entry is, therefore, the distinctive characteristic of the estate upon condition subsequent. The right of re-entry or possibility of reverter always remains or continues in the grantor or his heirs or in the heirs of the deviser where the grant is of an estate upon a condition sub-

sequent. That is not true of a conditional limitation. Nothing remains in the grantor, and upon the happening of the event named the first estate terminates and the second begins. See for example:

2 Wendell's Blackstone, 155, 156;

16 Cyc. 607;

6 A. & E. Ency. 504;

Church v. Grant, 3 Gray 142, 147, 151;

Attorney-General v. Merrimac Co., 14 Gray 586, 612. .

In the second place, it is submitted that under a correct construction of the will the daughters like the sons were given contingent remainders or executory devises by way of contingent remainders, contingent (a) upon their surviving the expiration of the 25-year lease and (b) in the case of the sons, upon their paying to each of the surviving daughters \$5000, and in the case of the daughters, upon the sons not paying within one year from the expiration of the lease the sum of \$5000 to each surviving daughter; that, in other words, if the sons or one or more of them survived and paid as just stated they would have all of the lands, and, if they did not survive or did not pay, then they jointly with the daughters would receive one-ninth each in the lands, and as to the daughters, if the sons survived and paid, they (the daughters) would have \$5000 each and no more, and if the sons did not survive or did not pay then the daughters jointly with the sons would receive one-ninth each.

For the moment the question of precisely what the condition or contingency was upon whose happening or failure to happen the alternative contingent remainders or executory devises were respectively to take effect may be passed by.

An examination of the will (Tr., p. 19) will show that its provisions were substantially as follows: After reciting the fact that all of his lands excepting a parcel of 100 acres and another parcel of 2 acres had been leased by the testator to the Kilauea Sugar Company at a rental of \$6000 per year for the term of 25 years commencing November 1, 1890, and ending November 1, 1915, he gave in Article "First" to his widow a life rent of \$2000 or one-third of the net income received under the 25-year lease and to each of his children an equal share of the remainder of \$4000 or of two-thirds of the yearly rent under the lease in question. In Article "Second" he divided the hundred-acre tract among his widow and his nine children. In Article "Third" (Tr., p. 22) the testator declared that it was his "sincere wish and will" that "at the expiration of the 25 years lease with the Kilauea Sugar Co." his lands should "befall in equal shares and interest" upon his three sons "or then surviving sons or son." Here is a direct devise of all of the lands to the sons, but upon the contingency that in order to take under that devise the son or sons so taking should survive the expiration of the 25-year lease. The use of the word "then" in the expression "then surviving sons or son" places beyond doubt that the survivorship must be of the 25-year

lease. To those only of Frank, Henry and Christian who survive that period is the devise of all the lands made but the devise is based upon the further contingency that "at such a time," meaning at the expiration of the 25-year lease, "these my sons or son" shall pay "to each one of my daughters or surviving daughters the sum of \$5000." The additional proviso is made that if one or two of the sons should be "at that time or within a year from that time," meaning at the expiration of the lease or within a year thereafter, unable to pay his share of the sum of \$5000 "to each one of my daughters or surviving daughters" the remaining two or one of the sons, meaning those with ability and willingness to pay, should have all of the lands by paying to each of the "daughters or surviving daughters" and to each of the "shortcoming son or sons" the same amount of \$5000. The testator adds in the same article that "by doing so they my sons or he my son will enter into full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above mentioned conditions." It is submitted that all of this is a clear statement that if one or more of the sons survive the expiration of the lease and are able and willing to pay the sum stated to each of the "surviving daughters" and to each of the shortcoming sons, they (the paying sons) are to have all of the lands by direct devise from the testator and that, in that event, the daughters and surviving shortcoming son or sons are to have \$5000 and nothing else.

In Article "Fourth" (Tr., p. 23) the testator says that "should none of my sons be able to pay these amounts" then his lands are to be sold or leased and the proceeds are to be "equally divided amongst my children or their lawful heirs and assigns" after the widow's dower has been secured to her. By this article the provisions of Article "Third" are supplemented. The alternative contingent remainder is thereby stated that if none of the sons survive or if none of those surviving the expiration of the lease pay the required sums of \$5000 each then all of the nine children (and the heirs and assigns of any deceased child by way of representation) are to take an undivided one-ninth each in the lands or their proceeds. The devise stated in paragraph "Fourth" is based upon the two contingencies of survivorship and payment or non-survivorship and non-payment, as the case may be, upon which the devises in Article "Third" are based.

A remainder is contingent "when it is so limited as to take effect to a person * * * not ascertained or upon an event which may never happen." *Woodman v. Woodman*, 89 Me. 128. In the case at bar it was impossible upon the death of the testator to ascertain which one or more, if any, of the sons would be alive at the expiration of the lease. There was entire uncertainty at that time not only as to what one or more of the sons would have the right to the enjoyment of the estate, but also as to whether any of them would have that right. It was also impossible upon the testator's death to know whether

any one or more of the sons would be able and willing to pay at the time named.

If the period of survivorship referred to in the expression "surviving daughters" is the expiration of the lease, a point to be considered hereinafter, then there is to be found as to the devises to the daughters an additional contingency. If a daughter survives and one or more of the sons pays, then that daughter takes \$5000 and nothing else. If a daughter does not survive the expiration of the lease, then even though one or more of the sons are able to pay she is not entitled to \$5000.

If it be suggested that the remainder to the daughters and to the sons must be held to be vested rather than contingent on the theory that no disposition of the land is otherwise made for the period prior to the expiration of the lease, the answer is that by the first clause of the will all of the income of the land for the period of the lease is disposed of to the widow and children in stated proportions and that this is the equivalent of a devise of the land itself for that time,—an estate for years.

See 3 Washburn Real Prop. (4th Ed.) 382;

Earl v. Roe, 35 Me. 414, 419;

Reed v. Reed, 9 Mass. 372, 373;

Caldwell v. Fulton, 31 Pa. St. 475, 479.

Whether a condition is to be deemed precedent or consequent depends upon what the intent of the testator was. Classifications of estates are made after we learn what the intent of the testator was and the

intent is not to be found from preconceived classifications. The conditions mentioned in Article "Third" are clearly precedent. As to the sons, the testator himself says that "by doing so, they my sons or he my son will enter into full possession of all my lands and their or his right and title will be undisputable." That is, the sons must first do what is required of them in the condition before the devise operates in their favor and before the estate becomes vested in them. So also on the other hand, the sons must first fail to pay and otherwise perform the condition before it can be known whether the daughters are to take \$5000 only or are to take one-ninth each of the lands. "Should none of my sons" be able to pay, then each of the nine children is to get one-ninth, says the testator in Article "Fourth,"—another indication that as to these nine children and the estate granted to them by Article "Fourth" the condition of non-performance by the sons is to be precedent. It is submitted that there is no indication in Article "Third" or in Article "Fourth" or elsewhere in the will that each of the children is given at the testator's death a one-ninth interest subject to possible defeasance later.

If, because of the possible intervention of the period of one year or of part of a year between the determination of the particular estate for years devised in the first article and the vesting of the interests of the sons or of the daughters or both in the land, the devises cannot under the precedents be properly regarded as contingent remainders they can

certainly be given effect as executory devises by way of contingent remainders.

See 4 Kent Com. (13th Ed.) 264 et seq.; 269;

1 Bouvier's Dict. (Rawle's 3rd Revision)
1151;

2 Underhill on Wills, Sec. 874 et seq.

In the interval, if any, between the determination of the particular estate and the taking effect of the limitation over the fee would be in the testator's heirs.

The use of the word "buy" in Article "Third" should not, it is submitted, be regarded as showing that the estate in the daughters was vested or that it would pass from the daughters to the paying sons. The remaining language of the will is more than sufficient to counterbalance the effect of the word "buy" if it stood alone. The testator has plainly said that it is his will that his lands "shall befall" upon his three sons. The lands are to go to the sons, not from the daughters, but directly by devise from the testator. The provision for payment of \$5000 by the sons to the daughters was simply the testator's way of carrying out his wish that the daughters should have \$5000 each and that the sons should have the lands.

Nor does the statement in Article "Fourth" that the "lawful heirs and assigns" of any deceased child of the testator are to have under Article "Fourth" a share of the lands militate against our contention that the remainders are contingent and not vested.

The word "heirs" is used there as a word not of limitation but of purchase; and as to the word "assigns" contingent remainders are assignable as well as vested remainders. The attention of the court is respectfully called to the dissenting opinion in the Kahilina case. It is submitted that it correctly states the law and correctly construes the will in the respects then under consideration.

4.

IMMATERIAL WHETHER DEVISE TO DAUGHTERS WAS OF A VESTED OR A CONTINGENT REMAINDER OR A CONDITIONAL LIMITATION.

It is in reality immaterial to the determination of the questions at issue in this case whether the devise to each of the daughters in Article "Third" is of a vested estate upon condition subsequent or of a contingent remainder (or executory devise by way of contingent remainder) or of a conditional limitation. Whether the correct construction is that adopted by the majority in the Kahilina case that each child took a present vested remainder in fee defeasible as to the interests of the daughters and as to any shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, or is that contended for by us that each of the daughters as well as each of the sons took a contingent remainder or executory devise by way of contingent remainder, in either event contingent

upon survivorship and upon payment as above stated, or is that suggested by Chief Justice Robertson that the estate to each of the daughters is a conditional limitation not defeasible but terminable upon the happening of the contingencies named, the result is the same. For whichever one of these views or classifications is adopted, the contingency or condition named in Article "Third" is all of the time one and the same condition; it means all of the time one and the same thing. Under the theory of the defendants in error and of the majority of the court below, the condition is a condition subsequent. Under our claim it is a condition precedent. Under Chief Justice Robertson's view it is, strictly speaking, neither precedent nor subsequent but is simply an event or series of events which marks the termination of the estate devised to the daughters. But whether it is a condition subsequent or a condition precedent or a contingency or condition marking the termination of one estate and the beginning of another, it is all the time one and the same condition. It cannot possibly be that if it is held to be a condition subsequent it must be held that the testator meant by it one thing; and that if it is held to be a condition precedent it must be held that the testator meant by it another thing; and that if it is held to be one of the terms of a conditional limitation, it must be held that the testator meant by it still another thing. The testator certainly meant one thing only when he prescribed the terms of that condition. He did not stop

to consider in legal terms whether he was creating a condition subsequent, a condition precedent or an element of a conditional limitation. He was simply defining what it was that should happen in order that his "sincere wish and will" might be carried out that all of his lands should "befall" upon his sons or son. To first say that the estates created were vested and then to argue that courts will hesitate to put into effect a condition of defeasance and that this is a condition of defeasance is, we submit, to put the cart before the horse, to decide the case first and to find the testator's intention afterwards. The only correct course is to determine from the language of the will what this and other provisions mean and then in accordance with these conclusions to classify the estates given and to see whether they are vested or contingent. Even the majority in the Kahilina case held that the estates which it regarded as vested would be divested upon the performance by the sons of the condition contained in Article "Third." The only question is, What is that condition? What is it that the sons are required to do? To what daughters were they required to pay? Who are the "surviving daughters" to whom they are required to pay? Surviving when? At the death of the testator or at the time of distribution, to wit, at the expiration of the lease? All of this, we submit, can be answered without consideration of the issue as to vested or contingent remainders, executory devises and conditional limitations.

WORDS OF SURVIVORSHIP — RULES OF CONSTRUCTION — TO WHAT PERIOD REFERRED.

General so-called rules of construction are often considered in the construction of wills. As to what these rules are, there can be but little if any dispute. We do not understand that they will be disputed in this case. The leading principle, of course, is that it is the intention of the testator which is to be sought by court and counsel. A will is a statement of the desires of the testator with reference to the final disposition of his property at and subsequent to death. What a testator intended by this or that provision is, therefore, very properly the most important matter to be considered and declared in the construction of his words.

We appreciate that as stated in some of the reported cases, rules of construction are mere aids to the ascertainment of that intention and that when they fail to give that aid, when on the contrary their adoption would merely serve to construe the language in a way which would frustrate the intention of the testator, then the so-called rules should be rejected and not applied; and yet many instances have occurred where those rules should be applied in spite even of minor differences in the wording of the wills under consideration. Had there not been many such cases in history, the rules themselves would never have been formed or stated. They grew out

of the experience of the courts that when testators made certain provisions or used certain expressions they usually meant this, that or the other thing as the case might be. The will in the case at bar is, we submit, one of the latter class to which a rule of construction often applied heretofore in other wills properly applies. Reference is here made to the rule relating to the construction of words of survivorship. Many cases decided upon that subject will be found to be helpful.

The general rule which we contend for is that where a gift is given to the "surviving" children, sons, daughters, brothers, sisters, or other relatives as the case may be, and that gift is preceded by a particular estate for life or for years, the words of survivorship in the absence of anything in the will indicating a contrary intention refer to the termination of the particular estate, such as at the death of the life tenant or at the end of the period of years named.

"Words of survivorship will be referred to the event plainly intended to accomplish the purpose of the testator, whether that event be before, at the time of, or after the death of the testator. As a general rule, words of survivorship in a will, particularly when used in connection with an immediate gift, refer to the death of the testator as the time at which the survivorship will be determined, unless it clearly appears from the context and surrounding circumstances that the testator intended to refer it to another time, after his death. But where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention,

usually refer to the termination of the particular estate, such as at the death of the life-tenant, although it has been held that even in such cases the survivorship is determined at the death of the testator." 40 Cyc. 1511, 1512.

"The later English cases * * * have adopted the rule that whether the gift be immediate or postponed and whether the property be real or personal, words of survivorship *prima facie* refer to the period of division. If there is no previous interest given, the period of division is the death of the testator and survivors at his death take the whole; but if a previous life estate be given, then the period of division is the death of the life tenant and survivors at such death take the whole. To the same effect is the weight of authority in the United States." 30 A. & E. Ency. 809.

"The testator devised his dwelling house to his wife for her life, and added, 'that on her decease, I give and devise the same to my surviving children, to be divided equally between them.' Five children survived the testator, but only two survived the wife; and the question is whether the word 'surviving' relates to the time of the testator's death or to that of his wife's death. According to the natural use of language, it has reference to the latter event. It is placed in close connection with her decease. No reference is made to the time of his own death in any part of the will. The word 'surviving' would be unnecessary and meaningless if he meant to give the remainder of the estate to all of his children. The children surviving on her decease must be taken to be the devisees intended." *Coveny v. McLaughlin*, 148 Mass. 576, 7, 8.

"In this will, it is perfectly clear, that the testator intended to give to his wife the improvement of his farm, during her life or widowhood" (in the case at bar the testator, it is perfectly clear, intended to make for his wife and children during the period of the existence of the lease the provision which is set forth in Article "First" of the will) "and having

carved out this estate for her, he gave the remainder to his surviving sons" (and having carved out, in the case at bar, the temporary provision set forth in Article "First" to be good until the expiration of the lease, he gave the remainder to his surviving sons as prescribed in Article "Third"), "to be equally divided between them. Had he given generally to his sons, all who happened to be alive at his decease, viz., all who survived him, would have taken. This construction the demandants contend for. But if 'surviving' meant those who outlive the mother, then, as one only survived her, he took the whole estate, which the tenant now holds under him. Perhaps the reason of the preference which the law gives to vested over contingent remainders, could not be better illustrated than in this case. As several of the sons had families and left children, justice would seem to require, that these grandchildren should partake of their ancestor's bounty rather than that the whole should go to one child to the exclusion of all the other children and grandchildren. This certainly is a strong reason to influence the mind of *the testator*" (the italics are ours) "to induce him to give vested rather than contingent remainders. And it may lawfully and properly influence our mind in cases of doubtful construction; because we should suppose it more probable, that the testator intended the one than the other. But it can never authorize us to make a will for him. He says, 'should my wife marry or die the land *then* shall be equally divided among my surviving sons.' The time when the estate was to be divided among the sons is certain and definite. It was when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided? Not those who survived any prior event, not those who survived the father; but those who survived that particular event, those surviving the death or marriage of the widow.

"Had the testator intended to give to the sons who were alive at his own death, he would have said, 'my sons who survive me, or whom I may leave, or who

shall be alive at my decease,' or, if he had given to his sons generally the effect would have been the same. * * *

"The provision that each son should pay the daughters sixty dollars, on coming into possession, cannot have much tendency to show, that he intended to give a vested remainder. No doubt he expected, that the sons would survive the mother, at least, more than one of them, and that the daughters would receive a much larger sum than sixty dollars. But it cannot be inferred, that he intended the heirs of the deceased sons should take portions; because if he had, it must be presumed, that he would have required the sons' heirs, as well as the sons themselves to pay the sixty dollars to the daughters." (In the case at bar the will in this respect is even clearer for the testator expressly says that the land shall befall only upon the "then" surviving sons and that they only shall be required to pay the sums of five thousand dollars.) *Olney v. Hull*, 21 Pick. 311, 313-315.

"Where there is a gift to children for life, and, as each child dies leaving issue, a gift of the share of the child so dying to the issue of that child, with a gift over to surviving sons and daughters of the testatrix if the life tenant dies without issue, the surviving sons and daughters are the sons and daughters who survive the life tenant who dies without issue. This is usually the meaning of these words." *Dary v. Grau*, 190 Mass. 482, 486.

"The question to what period survivorship is to relate must depend rather upon the apparent intention of the testator in each case than upon any rigid rule. Here were two separate life estates, preceding the time for distribution, the various legacies to persons from the principal of the fund were to be paid only in case the legatees named should survive the testator's wife. The testator had in mind in these clauses a later period of survivorship than his own death. All the residue of said trust fund, which was finally to be divided, was what should be left after the end of both of the life estates, and after

the payment of all of the specific sums to the different persons and societies named. This residue was not ascertainable until the time came for its distribution." (In the case at bar, there is absolutely no room for doubt, as will be pointed out hereinafter, that the time for distribution was the expiration of the lease.) "The word 'surviving' more naturally relates to that time when the residue was to be ascertained and distributed. * * * This gives effect to the word 'surviving.' * * * The rule that the law leans towards vested remainders always yields when a contrary intention of the testator is to be gathered from the fair construction of the whole will; and where the question is to what period words of survivorship shall be referred it is often more reasonable to suppose that the testator meant the period of distribution." *Denny v. Kettell*, 135 Mass. 138, 139, 140.

"It is now well settled in this state as a rule of general application to the construction of wills that when a gift is made for life and then over to survivors the period of survivorship is to be referred to the period of distribution and not to the death of the testator" (citing authorities), "but the testator may if he choose fix otherwise the period of vesting; and when he has fixed upon the happening of a contingency the estate will not vest until such contingency happens." *Ridgely v. Ridgely*, 100 Md. 230, 233.

"The last proposition depends upon whether the words 'my surviving children' mean those living at the death of the testatrix or those living at the end of the particular estate. The use of that term 'surviving children' is very common in wills and the question whether it means children surviving at the death of the testator, or at some other period, has been much discussed and variously decided, but in every case the decision has aimed to meet the intention of the testator in the particular will as such intention is gathered from the whole will and the circumstances to which it applies. No unvarying rule can be laid down for the interpretation of those

words or words of similar meaning, but, subject to exception, when the facts of the particular case require it, the general rule is that if an estate is given by will to the survivors of a class, to take effect on the death of the testator, the word 'survivors' means those living at the death of the testator, but if a particular estate is given and the remainder is given to the survivors of a class, the word 'survivors' means those surviving at the termination of the particular estate.

"There is a learned discussion of this subject in each of the briefs with which we are favored and authorities are there collected and cases discussed. But we do not think it would profit to attempt to review the authorities referred to, since this court has in at least two cases gone over the whole field and laid down the rule as we have above stated it. (*DeLassus v. Gatewood*, 71 Mo. 371, and *Dickerson v. Dickerson*, 211 Mo. 483.)" *Sullivan v. Garesche*, 229 Mo. 496, 506.

In *Dickerson v. Dickerson*, 211 Mo. 483, 486, 496, the devise was :

"If she marries or ceases to be my widow, the farm then reverts to my children, to be equally divided between them, and at her death said farm to be divided between my surviving children, and grandchildren if any whose parents are dead. * * *

"The foregoing construction is borne out by asking the question, when is the farm to be divided? The will says at the widow's 'death.' Among whom is it to be divided? According to the will 'equally divided between my surviving children, and grandchildren if any whose parents are dead.' Surviving when? At the time the division of the estate is to be made—that is, upon the marriage or death of the widow."

"To what time does the word 'survivors' relate—to the time of the death of the testatrix, or that of Mary H.? The English and American cases bearing upon this question were considered in *Hill v. Bank*,

45 N. H. 270, and the conclusion reached was stated in these terms:—"If there be a bequest to one for life, and then to the children of the testator or the survivors of them, those children will take who, at the death of the tenant for life, answer the description in the will, to the exclusion of the representatives of those who are then dead. This, we think, is the rule when the bequest is in these terms and nothing more; subject, of course, to be controlled by a manifestation, in the will, of a different intention.' In that case the fund was to be equally divided among the testator's living children after the decease of his widow, who had the interest of it during her life; and it was held that the natural and obvious meaning of the terms, as well as the established rules of law, gave the fund to the children living at the time of distribution. The court say: 'To include the children of a son deceased before the death of the tenant for life, would be making the will speak language which was not used by the testator and not implied by the general tenor of the instrument.' * * *

"The natural significance of the language is that those of the persons named who should be living at the death of Mary—the time when the distribution is to be made—are the survivors referred to. The event upon the happening of which payment is to be made is expressed, and the survivorship mentioned obviously relates to it. Upon Mary's death the remainder is to be paid to the persons named or the survivors of them at that time. The meaning is not changed by regarding the words as speaking as of the date of the death of the testatrix. The survivorship cannot be referred to that date without drawing an inference that conflicts to some extent, at least, with the natural meaning of the language used. Besides, if such had been the intention, other words would naturally have been used, as, for example, 'those who survive me.'" *Hall v. Blodgett*, 70 N. H. 437, 439, 440.

"The only remaining question is, who are meant

by the terms 'my surviving legatees,' found in the second clause of the will, and used to designate the persons who were to take in the event which has happened,—the death of Rocinda without issue. The question is whether those terms mean the legatees who survived the first taker, Rocinda, upon whose death without issue these survivors were to take. This question is conclusively answered by the authorities. In 2 Jarm. Wills (Perk. Ed.) 462, the author, after citing and commenting upon the cases, says: 'In this state of the recent authorities, one scarcely need hesitate to affirm that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.' It is true that the learned author calls attention to the fact that some of the cases forbid the application of this rule to devisees; but he adds that 'it is difficult to discover any ground for making them the subject of a different rule.' * * *

"Where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.' The words italicized in this quotation show very clearly that the rule is not confined to cases where the precedent estate is a life estate, but embraces cases of any other prior interest. So, in the case of *Presley v. Davis*, 7 Rich. Eq. at page 107, Wardlaw, Ch., in stating the rule, says:—'If the enjoyment be postponed by the interposition of a particular interest, such as a life estate, or by fixing a future period for division, such as the attainment of the legatee to full age, then words of survivorship more naturally relate to the period of division and enjoyment'; showing very clearly that it is not the nature of the preceding estate which gives rise to the rule, but that it grows out of the fact that a future period of distri-

bution is contemplated. And as said by the said chancellor in *Ballard v. Connors*, 10 Rich. Eq. at page 392: 'Where the enjoyment of the estate by those ultimately entitled is absolutely postponed to a future day by a supervening estate, it is natural and just to make the chances of survivorship applicable to such future day.' He does not say a 'supervening life estate,' but a 'supervening estate,' which would include an estate other than a life estate." *Selman v. Robertson*, 24 S. E. (S. C.), 187, 191.

"The weight of authority seems to be, that where an estate is granted to a class of persons described as survivors, such estate does not usually vest until the time designated for the beginning of the enjoyment of the estate by that class of persons; and the word 'survivorship,' or 'survivors,' as, in such case, refers to that period." *Cheney v. Tesse*, 108 Ill. 473, 482.

There are many other cases to the same effect, all of them based on the reasoning that in the absence of any language showing a contrary intention the rule as above stated gives effect to the natural and ordinary meaning of the words and to what obviously was the intention of the testator,—that if the testator had meant in any given will to refer the survivorship to the date of his own death, he would have used some expression tending to show that intent, as, for example, "those of my children who shall survive me" or "those of my sons (or daughters) who shall be living at my death." Simple language can always be easily found to express such intention where it exists. See, for example, the following cases:

Lawrence v. Phillips, 186 Mass. 320, 322;

Holcomb v. Lake, 24 N. J. L. 686, 7, 9, 690;

Biddle v. Hoyt, 54 N. C. 159, 163, 164;
Hawke v. Lodge, 77 Atl. (Del.) 1090, 1091;
In re Winter, 114 Cal. 186-190;
Blatchford v. Newberry, 99 Ill. 11, 40-45;
Hill v. Bank, 45 N. H. 270-273;
Hulburt v. Emerson, 16 Mass. 240, 243, 244;
Von Tilburgh v. Hollinshead, 14 N. J. Eq. 32,
 33-35;
Williamson v. Chamberlain, 10 N. J. Eq. 373,
 5, 6;
Sinton v. Boyd, 19 O. St. 30, 35;
In re Baer, 147 N. Y. 348, 353;
Ridgeway v. Underwood, 67 Ill. 419, 424, 5;
 2 Williams on Executors (7 Ed.), 1575, 1576.

6.

DEVISE TO INDIVIDUAL—DEATH BEFORE TESTATOR—LAPSE.

“The general rule is that a legacy or devise will lapse where the legatee or devisee dies before the testator. And the same is true where he dies after the testator but before his interest under the will has vested.” 18 A. & E. Ency. 748, 749.

“At common law, in the event of the death of a beneficiary before the testator, the devise or legacy lapsed.” 40 Cyc. 1514.

This rule is so well established that we will not do more than to cite a few of the authorities declaring it.

Jackson v. Alsop, 67 Conn. 249, 251;
Collins v. Collins, 126 Ind. 559-561;
Stetson v. Easton, 84 Me. 366, 8, 9;

Kimball v. Story, 108 Mass. 382, 4;
Claflin v. Tilton, 41 Mass. 343, 4;
Goodwin v. Colby, 64 N. H. 401;
Re Kimball, 20 R. I. 619, 623;
Dixon v. Cooper, 88 Tenn. 177, 182;
Watkins v. Blount, 43 Tex. Civ. App. 460, 462;
 1 Jarman Wills (Bigelow's Ed.) top page 338;
 2 Redfield on Wills, page 484.

This rule and these authorities are cited merely because the underlying principle is the same as that in cases of devises to a class treated in the next point herein. In either class of cases the failure to survive the testator causes a lapse.

7.

DEVISE TO A CLASS—DEATH BEFORE TESTATOR—SURVIVORS TAKE ALL.

If the devise is to a class, the members of the class who survive the testator take the whole legacy. Where, therefore, the intention is to make the devise to daughters as a class or such of them as shall survive the testator, it is sufficient to express the gift as being to the daughters without specifying "surviving" daughters. In other words, if, in the case at bar, the testator's intention was to make the five thousand dollars payable to each daughter who should survive *him* it was unnecessary to say "surviving" daughters. It would have been sufficient to say "daughters," for that, in the absence of language to the contrary, would necessarily have been con-

strued as daughters surviving at the testator's death.

"Had he given generally to his sons all who happened to be alive at his decease, viz., all who survived him, would have taken. * * * Had the testator intended to give to the sons who were alive at his own death, he would have said 'my sons who survive me or whom I may leave or who shall be alive at my decease.' Or if he had given to his sons generally, the effect would have been the same." *Olney v. Hull*, 21 Pick. 311, 314.

"It is a familiar rule that a gift to a class to take effect immediately upon the testator's death includes only those who are living at that time." *Martin v. Trustees*, 25 S. E. 522, 523.

"In cases of gifts to a class as tenants in common the shares of members of the class dying before the testatrix do not lapse but go to the other members of the class." *Gordon v. Jackson*, 58 N. J. Eq. 166, 170.

"Without statutory intervention or express testamentary direction, it is entirely settled that upon the death of a legatee before the testator, the share which would have gone to such legatee, if he had survived the testator, falls into the residue.

"In the case of a gift to a class where upon the death of one or more of the members of the class before the testator, the remaining members will take the entire gift equally, no lapse occurs unless all the members of the class predecease the testator.

"Thus says Mr. Jarman, 'If property be given simply to the children or to the brothers and sisters of A equally to be divided between them, the entire subject of a gift will vest in any one child, brother or sister, or in any larger number of these objects surviving the testator, without regard to previous deaths.'—1 Jarman Wills, Sec. 311." *Trenton Co. v. Sibbits*, 62 N. J. Eq. 131, 132.

"It is a devise to a class. A class is a number of

persons or things ranked together for some common purpose * * * and when a legacy is to a class, all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment." *Mitchell v. Mitchell*, 73 Conn. 303, 307.

"It is a general rule of construction that where a legacy is given to two or more persons nominatim to be equally divided among them and one of them dies before the testator, his share will become intestate; but where the legacy is to two or more as a class, the share of a deceased legatee goes to the survivor or survivors." *Bolles v. Smith*, 39 Conn. 217, 219.

See also

30 A. & E. Ency. 718, 719;

40 Cyc. 1514, 15.

8.

CONSTRUCTION OF WILL OF BERTELMANN
—WHAT THE CONTINGENCIES STATED IN
ARTICLE "THIRD" ARE. "SURVIVING
DAUGHTERS" MEANS THOSE SURVIVING AT
THE EXPIRATION OF THE 25-YEAR LEASE.

Coming now to the will itself, the first article makes provision for the various members of the testator's family for the period of the life of the lease to the Kilauea Sugar Company. At the time of the execution of the will about twenty-four years of the term of the lease remained unexpired. About twenty years remained unexpired at his death. The lease reserved a rental of six thousand dollars per annum and the provision was that the widow should have out of this rent \$2000 yearly, that each of the children should have an equal share of the remaining

\$4000 and that in the event of any change in the rental the widow should have one-third and the children in equal shares the remaining two-thirds of the substituted rental; and further that in the event of the death of the widow prior to the expiration of the lease, her one-third of the rental should be added to the children's two-thirds. The article marked "Second" dealt solely with the disposition of a certain tract of one hundred acres not covered by the lease to the Kilauea Sugar Company, which tract is not referred to in the portions of the will directly involved in this case. Articles "Third" and "Fourth" (Tr., pp. 22, 23) read as follows:

"Third. At the expiration of the 25 years lease with the Kilauea Sugar Co. it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons: Frank Charles, Henry Godfrey, and Christian Sylvester Bertelmann or then surviving sons or son. Provided however that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand Dollars \$5000.00. In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the \$5000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

"1° to each of my daughters or surviving daughters the amount aforesaid of \$5000.00.

"2° to my shortcoming son or sons the same amount of \$5000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable,

provided they or he (my sons or son) comply and fulfill the above mentioned conditions.

“3° To my wife Susan Bertelmann a life rent of \$2000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate.

“Fourth. Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to circumstances and best advantage of my family. The money deriving from said sale or lease will be equally divided amongst my children or their lawful heirs and assigns after the distributive share of dower will have been given to my wife Susan Bertelmann according to law.”

There is nothing in the remaining articles of the will which can throw any light upon the questions under consideration.

Articles “Third” and “Fourth,” it is submitted, are alternative provisions. If the sons do certain things in Article “Third” stated, the devise is to be as set forth in that article, but if the sons do not do those things, then the devise is to be as set forth in Article “Fourth.” What are those things which they are to do? is one way of stating the main question now before the court. It is always profitable in will cases to read the will first much as a layman would do and endeavor, without reference to precedents, to learn the intention of the testator. So reading this will, there can be, it is submitted, no doubt as to that intention upon the point now under consideration. The testator says that it is his will that “at the expiration of the 25 years lease” his lands “shall befall” upon his three sons, Frank,

Henry and Christian, "or then surviving sons or son" with a proviso that "at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand Dollars \$5000.00." In the first place, it is clear that any contention that the testator intended to treat all the children alike would be utterly unfounded and in conflict with his express words. (a) He certainly intended to favor the sons as against the daughters in the matter of the devise of the lands. It was to the sons and not to the daughters that he devised all of the property mentioned consisting of all of his property leased to the Sugar Company and all of the lands which he owned other than the hundred acres and two acres of taro patches. To be sure he provided a gift of five thousand dollars to each daughter but the lands themselves nevertheless were to go to the sons. (b) He favored the "then" surviving sons or son as against the sons or son not "then" surviving. There is simply no room for argument on this latter point. The language is too unambiguous to permit it. Whatever period of time the "then" refers to, the surviving sons alone were to receive the lands and the non-surviving sons were to receive not only no interest in the lands but no payment of five thousand dollars or any other sum. "Shortcoming heirs of any deceased son" or "heirs of any shortcoming son" are mentioned nowhere in the will.

The "then" used in the words just quoted clearly refers to the expiration of the 25 years' lease, to wit, November 1, 1915. In various ways does the lan-

guage of the testator show this and in no way is it contradicted or doubt thrown upon it. The statement is that the lands are to befall upon the three sons "at the expiration of the 25 years' lease with the Kilauea Sugar Company." Prior to the use of the word "then" in the first sentence of Article "Third," no period of time had been mentioned other than the expiration of the 25-year lease. The proviso immediately following this sentence is that "at such a time," meaning clearly the only time thus far mentioned, the same expiration of the twenty-five-year lease, the sons shall pay "to each one of my daughters or surviving daughters" the sum mentioned. Then he proceeds, "In case one or two of my sons should be *at that time*" (referring again to the only time thus far mentioned, the expiration of the lease) "or within a year from *that time*" (again meaning the same period of time) "unable to * * * raise the necessary amount * * * the two or the one of my sons will have the right to buy the whole of my lands now leased to the K. S. Co. by paying" the amounts there stated. It was undoubtedly intended by the testator that this acquirement of title by the sons should occur only after the termination of the 25-year lease. This is stated in so many different ways in Article "Third" that there is no escape from that conclusion, and in addition the fact that in Article "First" provision had been made for the family for the period preceding the expiration of the lease lends added strength to the construction here contended for. What language can pos-

sibly be pointed to in aid of a construction that the period of survivorship *as to the sons* was any other than the expiration of the 25-year lease? None whatever. If the period of survivorship as to the sons was the expiration of the lease would it not be the natural thing for the testator to do to refer to the same period of survivorship as to the daughters? At the very least, it would be expected that if he meant to prescribe a different period of survivorship as to the daughters he would have used language clearly indicating that intention and purpose. No such distinction is expressed. On the contrary, it is submitted that the same time is referred to throughout Article "Third" as the time of survivorship of the daughters and that of survivorship of the sons. The words which are the ultimate subject of construction in this case are to be found in the proviso "provided however, that at such a time these my sons or son shall pay to each of my daughters or surviving daughters the sum of five thousand dollars \$5000.00." The time of the making of the payments is stated with perfect clearness. It is "at such a time * * * or within a year from that time," which can only mean at the expiration of the lease or within a year from the expiration of the lease. If that is the time of payment, then when the testator speaks of "surviving daughters" he must, in the absence of any language to the contrary, be regarded as meaning daughters surviving at the time of which he is speaking. That would be

the ordinary meaning of the language used and the grammatical connection points to that meaning.

It is true that as to the sons the expression is the "*then* surviving sons or son" and that as to the daughters the expression is "daughters or surviving daughters" without the use of the word "then," but it is also true that after once speaking of the "*then*" surviving sons the testator omits that word as though his meaning had already been made sufficiently clear and speaks of his sons as "these my sons or son" and "my sons," and later again "my sons," and still later "they my sons or he my son." In other words, having once made clear that his reference in this clause "Third" was to the sons or son who should be "*then*" surviving he deemed it unnecessary to repeat and repeat that one word. So also as to the daughters. The reference to them is practically in the same breath as the reference to the sons. It is immediately following and in connection with the reference to the "*then* surviving sons or son." Read grammatically, read in their ordinary natural meaning the first impression certainly is and the last impression ought to be that the testator meant daughters surviving at the period of time that the sons were required to survive. If the testator was attempting to make it known to the world in general and his family in particular that what he meant was that the sons who should be surviving at the expiration of the lease should make the payments to the daughters who were surviving at his own death, surely he would have employed language more apt to

express that thought. Without conscious effort it could very easily have been done.

It cannot be successfully contended that the fact that in Article "Fourth" the "heirs" of any deceased child is to take its parent's one-ninth of the lands shows that under Article "Third" the heirs of a daughter not surviving the expiration of the lease would take one-ninth of their ancestor's right to \$5000. The testator *did* limit the right to the \$5000 to his "surviving daughters." Those are his own words. Whether the period of survivorship was his own death or the time of distribution (the expiration of the lease), the fact of survivorship was made by the testator indispensable to the right to \$5000. If a daughter did not survive the prescribed period, whatever it was, she could not get the \$5000 and the sons need not pay it, and that, necessarily, irrespective of whether or not she left children or other heirs. The express limitation made by the testator, "*surviving* daughters," must be utterly disregarded if the words "or their lawful heirs or assigns" are imported from Article "Fourth" and grafted into Article "Third." Article "Fourth" does not limit its gift to "surviving daughters" or to "surviving children." The omission there of that limitation was entirely consistent with, if not demanded by, the desire to have the heirs of any deceased child take a share equally with each of the testator's living children and is in significant contrast with its presence in Article "Third."

It is submitted that the general scheme of the will

was this: First, to divide the income accruing during the term of the lease amongst the children and widow of the testator; secondly, to divide the hundred-acre parcel amongst the children and widow; thirdly, as to all of the other lands of the testator to give them to the sons who should be living at the expiration of the lease providing they should, at the expiration of the lease or within a year from that time, pay to each of the daughters surviving *at that time* and to each of the shortcoming sons surviving at that time the sum of five thousand dollars (\$5000.00); and fourth, as to all of the same lands mentioned in Article "Third," to divide them or their proceeds amongst all of his children then surviving and the lawful heirs (by way of representation) of any dying before that time (subject to dower in favor of the widow). So regarded, the will is a consistent whole. The discrimination with reference to the \$5000 payments, in favor of daughters living at the expiration of the lease and against those dying prior thereto, is an intentional discrimination and is the equivalent of the provision made in the case of the sons, the same discrimination being undeniably shown in favor of sons surviving at the expiration of the lease and against those not so surviving.

Let it be remembered in this connection that the provision for the payment of \$5000 to each shortcoming son applies only in favor of each shortcoming son who shall be surviving at the expiration of the 25-year lease. Of this there can be absolutely no doubt. At the expiration of the lease, the lands are to befall

in equal shares “upon my three sons * * * or *then* surviving sons or son. Provided however that at such a time these my sons or son shall pay * * *

In case one or two of my sons should be at that time or within a year from that time unable to furnish, produce or raise” the money, then the two or the one remaining may perform the conditions. Can this reference to sons who are to raise the money mean anything other than sons living at the expiration of the lease? Can this reference to sons who are unable to raise the money mean anything other than sons who are living at the expiration of the lease? Obviously not. The testator first says that his lands shall befall upon those only of his sons who survive “then,” at the expiration of the lease, provided they make the \$5000 payments. Having said that, he continues referring to the same class of sons, that is, those “then” surviving, and adds that if one or two of them are unable to pay then the others or other may pay to the daughters and to the “shortcoming son or sons.” Certainly the “shortcoming sons or son” are those who, though they survived, yet were unable to pay. If the shortcoming sons entitled to receive \$5000 can be those only who survive the expiration of the lease, what reason is to be found in the words of the will for holding that the provision as to the daughters entitled to receive the \$5000 is any different,—that as to them they need not survive the expiration of the lease? Pure surmise and nothing else can be called to the aid of any

such theory. The words of the will are all the other way.

Thus far in this subdivision, the true construction has been sought without reference to the authorities. It is submitted, however, that the rule above contended for as having been applied in many other will cases, that, where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship in the absence of anything indicating a contrary intention usually refer to the termination of the particular estate such as at the death of the life tenant, applies. We have here a gift of a preceding estate for years, to wit, until the end of the lease, and we have in addition a time expressly and unambiguously named for the performance of the condition, to wit, the expiration of the lease and one year thereafter. Had there been no gift of a preceding estate and were the condition to be performed at the death of the testator, an entirely different situation would have presented itself. The expressions in Article "Third" "at the expiration of the 25 years lease," "or then surviving sons or son," "at such a time," "at that time" and "within a year from that time," all support the view here contended for that the period of distribution in the mind of the testator in drawing Article "Third" was the expiration of the lease and are all inconsistent with the theory that the date of the death of the testator was the time for distribution. The substance and the nature of the successive provisions to be found in Articles "First," "Third" and "Fourth" all tend to

strongly support our contention in this respect. The survivorship referred to was to be measured as of the date of the expiration of the lease and not as of the date of the death of the testator. The lands were not to befall on the sons until the expiration of the lease. The payments were not to be made to the daughters until the expiration of the lease. When he spoke of "*then* surviving" sons, beyond any question he meant sons surviving at the expiration of the lease; and when he spoke of "surviving" daughters, all the indications in the will are that he meant daughters surviving at the same time. The general rule as to the construction of words of survivorship is applicable.

Because under Article "Fourth," the heirs of any child who shall not survive at the end of one year from and after the expiration of the lease would take land is not a reason for holding that under Article "Third" the heirs of a child not surviving at the expiration of the lease would take \$5000 in her own right. The provisions are different. Their language is different. An essential term is expressed in the later one which is not expressed in the earlier one. Survivorship is not mentioned in the "Fourth." It is in the "Third." All sons and all daughters take under the "Fourth," while only surviving sons and daughters take under the "Third." All sons take land under the "Fourth"; only non-shortcoming sons take land under the "Third." Sons and daughters, "children," take alike under the "Fourth"; sons and daughters take differently under the

“Third.” So also “heirs” take under the “Fourth,” but do not take under the “Third.” Each provision was intended to apply under a different set of circumstances. In each the substance of the provision is different. The testator himself made them different as he had a right to do. It is not for us or the court to endeavor to make the treatment of the children in the two cases more nearly alike (according to *our* judgment) in both cases. The circumstances are different, the treatment of the objects of his bounty is different, and the material words are different. The testator must be presumed to have used purposely the different material words in the two clauses.

The expression in Article “Third” “daughters or surviving daughters” means, it is submitted, that the gift of \$5000 there mentioned was to go “to my daughters if they all survive but if they do not all survive, then to my surviving daughters,”—this irrespective of whether the period of survivorship referred to is the one or the other under consideration. Our opponents recognize that the gift of \$5000 is to the “surviving” daughters only and that the duty which the sons owe if they wish to become undisputable owners is to pay to the “surviving” daughters only. That our opponents do recognize this is shown by the strenuous efforts made by them to have the period of survivorship construed to refer to the earliest possible time, that is, to the death of the testator, so as to bring the daughter Catherine within the class of “surviving daughters.”

There is no rule of law or of construction which justifies the construing of the words of survivorship to refer to the earliest possible period in order to make as many daughters as possible come within the class of surviving daughters or to arrive at the construction in the light of events as they subsequently happened. The will must be construed as of the date of the testator's death and upon the facts as they existed and were known to him at that date. The fact that Catherine died before November 1, 1915, although after the testator, cannot be used as a reason for holding that the intention was that the words of survivorship refer to the time of the death of the testator.

The rule that a will should be construed so as not to leave any intestacy has no place in this discussion since under either construction contended for no intestacy would result. The presumption likewise that a testator does not intend to disinherit those who would otherwise be his heirs can always be overcome by plain words or by implication. The court's function is to construe, not to make a will for the testator. *Grothe's Estate*, 229 Pa. St. 186, 190. In *Bertelmann's will*, it clearly appears that he did intend, under certain circumstances, to disinherit certain of his heirs. Non-surviving sons were, under certain circumstances, to be disinherited under Article "Third." The children of non-surviving sons were to be disinherited. Sons who, though surviving, should fail to comply with the requirement as to payment, were to be disinherited in so far as the

land was concerned and to receive only the lesser payment of \$5000. Beyond any question likewise non-surviving daughters and their children were to be disinherited, passing for the moment the question as to what period of survivorship was referred to. There is no room for any eloquence on behalf of poor, disinherited grandchildren. The court does not do the disinheriting; the testator has done it himself and what he has done we must all respect now. Much worse things according to the views of some of us have been done by testators in the way of disinheriting heirs than were done in the present will.

9.

COMMENTS ON ARGUMENT FOR DEFENDANTS IN ERROR.

The main argument advanced on behalf of the plaintiffs seems to be that it is apparent from the will that it was the testator's intention to treat alike all of his children and to devise to the children of any deceased child by way of substitution for the share which would otherwise go to that child. In the foregoing pages we have already answered this contention to some extent. It is our contention that no such scheme of equality, in so far at least as the provisions of Article "Third" are concerned, is apparent or can be supported. It may be added, however, that the statement in the plaintiffs' brief in the court below that the lands devised by Article "Third," yielding as they did \$6000 rent annually,

can well be regarded as of the value of \$100,000, emphasizes the correctness of our contention as to some of those inequalities. (1) The testator in clause three deliberately gave to his three sons (three at most) all the lands (worth about \$100,000) less the cost to them of from \$30,000 to \$40,000, while he gave to the six daughters at most \$30,000 in all (\$5000 to each). (2) He beyond doubt gave all the lands to the "then surviving" sons while he gave nothing to the non-surviving sons, not even \$5000. (To show this inequality of treatment of the sons, it is immaterial whether he meant those surviving at his death or those surviving at the end of the 25-year lease.) (3) He made it possible for *one* "then surviving son" (if there was only one) to be the devisee of all the lands by paying to the daughters, six at most, \$5000 each or \$30,000 in all and for that sum to acquire \$100,000 worth of land. (4) He made it possible for one of two "then surviving sons" to have all the lands (worth \$100,000) by paying at most \$35,000, i. e., to receive \$65,000 net value, while the other "then surviving" son, if financially unable, would get only \$5000 and no land.

And even under opposing counsel's contention the testator would not be treating his children equally for any daughters who died before him would get nothing and their children would get nothing. Under the contentions for the defendants in error if five daughters had died before the testator and one had survived him, the one would get \$5000 and the five and their children would get nothing. And all the

time these are the same grandchildren in whose behalf the plaintiffs' brief pleads so eloquently. The truth of the matter is that to refer the words of survivorship to the testator's death does not in principle accomplish equality of treatment among the children or grandchildren any more effectually than does a reference of those words to the time of distribution (the end of the 25-year lease). In either event if any children have predeceased they get nothing. Of course, the fact known now but not known at testator's death that one daughter who survived the testator died before November 1, 1915, and that none died before the testator cannot affect the intention of the testator or be considered in the construction of the will. The instrument must be construed as of the date of the testator's death.

That the expiration of the 25-year lease and the period of one year thereafter is the time when the sons are required to make the payments to the daughters is conceded by the defendants in error.

The devise of the income under Article "First" to the testator's "children or surviving children" probably means to those surviving at the testator's death and the devise of Susan C. Bertelmann's \$2000 a year, during the remainder of the term of the lease, to his "children or surviving children" probably means to those of his children surviving the widow. In the devise of the \$4000 to the children, there is no intervening estate whether for life or for years and the survivorship can only be referred to the time of the testator's death. In the case of the \$2000 in-

come just referred to, the widow's life interest intervenes between the testator's death and the gift of the same \$2000 to the children. In both of these instances the construction which we have just suggested of the reference of the survivorship in the one case to the death of the testator and in the other to the death of the widow is in accordance with the general rule laid down in the authorities above cited; and no inference can be drawn from the language of Article "First" in support of the claim that "surviving daughters" in Article "Third" means those surviving at the testator's death. The circumstances underlying the two articles are different. There are too many indications in the will of an intent on the part of the testator that by "surviving daughters" (in Article "Third") he meant those surviving at the end of the 25-year lease to permit of the construction contended for by the defendants in error; and no indications that the intent was as contended for by the defendants in error.

To adopt plaintiffs' construction of the will requires a resort throughout to surmise as to what the testator intended. It is based upon a theory of equality which is not supported by the words of the will but is, on the contrary, disproven in various ways by the language used. It requires constant reference to what, as others now think, the testator would naturally be expected to do. It has insufficient reference to the language which he used. Our construction on the contrary is borne out in its entirety by the express language used and is not in the

least built upon surmise. The question before the court is, of course, what devise did the testator make in and by this will and not what devises would we have made if we had been in his place. Nor do we mean by this to even appear to admit that the provisions of Article "Third" as we construe them would be unnatural or harsh towards any of his children. The testator best knew his family and best knew by what manner of provisions their best interests could be attained. A desire to avoid as far as possible entangling trusts and provisions for minors may well have actuated him. In any event, the property was his to do with as *he* pleased. What would be "human, natural and right" under the circumstances as he knew them would be for him and not for anyone else to decide.

10.

COMMENTS ON CASES CITED FOR DEFENDANTS IN ERROR IN THE COURT BELOW AND PROBABLY TO BE CITED IN THEIR BRIEF IN THIS COURT.

The contention is made that Catherine's interest, even though contingent, was descendible and that, therefore, her children have it now, and in support of that contention *Winslow v. Goodwin*, 7 Met. 363, is cited. At page 377 that case does hold that contingent interests are transmissible to heirs, but at page 379 it is recognized "that there is an important qualification of this rule that where the existence of

the devisee of a contingent interest at some particular time by implication makes a part of the contingency, and enters into it, the contingent interest cannot descend," and applying this qualification or exception adds (page 379) that if "the devise was limited to the children living at the death of their mother, the objection would be decisive against the plaintiff's claim to the shares of the two children who died before that time." We contend that the devise of \$5000 to Catherine was contingent upon her survival of the 25-year lease. If it was, by the very terms of the will the contingency happened before her interests could descend. To descend, there must be an heir; there can be no heir before the ancestor dies; when this ancestor died (before the 25-year lease ended) it became impossible for the devise to her of \$5000 to ever take effect or become vested; therefore, it could never descend.

If, on the other hand, the devise to Catherine was *vested* and not contingent, it was nevertheless subject to defeasance, upon performance of the condition; and the condition has been performed by the sons. It was not a part of the condition that they should pay to Catherine, because she died before the lease expired. The condition of defeasance was, on this theory, a part of the devise to Catherine. The very death of the mother (Catherine) at the time it took place (the sons having performed as to the payments to the other daughters), defeated her so-called vested estate and it became impossible for the latter to descend to her heirs.

As to *Lathrop v. Merrill*, 207 Mass. 6, 10: We agree with the statement that the province of the court is not to conjecture what the testator's intention was and then read it into the will, but to ascertain his intention by construing the words which he used as declaratory of it. We submit that in the construction contended for by the plaintiffs, the rule just cited is violated and that in ours it is not. In the *Lathrop* case cited by plaintiffs, the court was asked to rule that "since the fourth clause of her will shows that the testatrix intended all legacies to be inalienable and not subject to be taken for the legatees' debts," therefore, "the legacies given by the third clause should be construed to be equitable and not legal interests in order that that intention of hers may be carried into effect." The court refused to do so on the ground that to arrive at that construction, conjecture would have to be resorted to. That is paralleled in this case by the argument that because by clause "Fourth" a devise is made under certain circumstances to the heirs of any deceased child, therefore, under clause "Third" the devise must be held likewise to include the children of any deceased child. The Massachusetts case applies. Conjecture would have to be resorted to. Moreover, the two clauses are so essentially different in their terms, as already pointed out, as to prohibit the adoption of plaintiffs' argument on the point.

The case from 189 Mass. 266 will be found on examination not to be an authority on the point for which it is cited by defendants in error. The words

“surviving children” were not used in the will there under consideration. The only rule laid down was that “in cases of doubt in the construction of wills, the law favors the creation of vested rather than contingent estates.”

Schouler, in his work on Executors and Administrators (cited by defendants in error in the court below) “shrinks from entering” into a full discussion of the question as to the time to which words of survivorship are referred. What he says in the section cited (565 and notes) cannot give much comfort to those contending that the words under consideration in the case at bar refer to the death of the testator.

In *Ball v. Holland*, 189 Mass. 369, 373, the court recognized the rule announced by “a line of decisions” that words of survivorship relate to the period of distribution at the end of an intervening life estate, citing *Olney v. Hull*, 21 Pick. 311, and other Mass. cases; but found other language in the will which seemed to the court to require, on the whole, a construction that the words in that particular will related to the death of the testator.

The distinction attempted by defendants in error in the case of *Olney v. Hull* is insufficient and ineffectual. There is no distinction on principle. In the Massachusetts case there was an intervening estate—to the widow for life or widowhood,—and in the case at bar there is an intervening estate, to the widow and children, for the remainder of the life of the lease,—an intervening estate for years.

In *Blanchard v. Blanchard*, 1 Allen 223, the facts and issues were entirely different from those in the case at bar. The devise under consideration was not to survivors, under that designation. It was to five named children and was accompanied with the proviso that "if any of the last five named children die before my wife, then the property to be equally divided between the survivors" and the issue of any non-survivor. The principal question was whether the five named children took vested or contingent remainders. Whether words of survivorship relate to the death of the testator or to some later period of distribution was not a question in the case and the subject was not discussed.

In *Spencer v. Adams*, 211 Mass. 291, 294, the court found sufficient in the will to show that the scheme of testator's will was one "of general equality amongst his children" and found other indications supporting the view that the words of survivorship referred to the testator's death. The will was holographic and the testator illiterate. The case is not in point.

The statement of the majority of the court in the Kahilina case, 14 Haw. 378, 382, 384, that it was the intention of the testator to "treat all the children equally as to quantity of interest" is, it is respectfully submitted, not borne out by the terms of the will. Our argument to the contrary is already set forth hereinabove. The question now under consideration was not before the court in the Kahilina case, and the remark just quoted cannot, for this

reason and for the other reasons already mentioned, be regarded as *res judicata*.

11.

THE SO-CALLED CONDITION SUBSEQUENT HAS NOT BECOME IMPOSSIBLE OF PERFORMANCE. EVEN IF CATHERINE'S CHILDREN NOW OWN A ONE-NINTH INTEREST, PLAINTIFF IN ERROR IS ENTITLED TO PAY THEM \$5000 AND THUS DEFEAT THEIR INTEREST AND HERSELF BECOME THE "UNDISPUTABLE" OWNER OF ALL OF THE LANDS MENTIONED IN ARTICLE "THIRD."

The majority of the Supreme Court of Hawaii held that "it is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. (Tr., p. 86.) It is submitted that this was an erroneous view of the law and of the language of the will.

As already stated, our contention is that the words of survivorship ("surviving daughters") contained in what the court below regards as the condition of *defeasance* (in Article "Third") refer to the expiration of the 25 years' lease. If they do, the condi-

tion has been already performed and the defeasance of all the interests of *all* the daughters has been already accomplished by the payment to each of the five daughters who did survive the 25 years' lease.

But the ruling of the court below, as to impossibility of performance, was based upon the view that the words of survivorship refer to the death of the testator. Even upon that assumption, that the sons must pay to the daughters *who survive the testator*, we submit that the condition can be performed by paying to the heirs of Catherine who did survive the testator but who did not live until the time for payment arrived. Upon the assumption stated, this *must* be the conclusion of the court. If the language of Article "Third" is susceptible of two constructions, one of which leaves the provisions of Article "Third" workable and renders effective the devise there made to the sons and the other of which renders Article "Third" wholly unworkable and the devise ineffective, that must be adopted which is consistent with the provision being workable and the devise possible of performance.

It is clear beyond doubt that the sons were not required to make the \$5000 payments *before* the expiration of the lease. "At the expiration of the 25 years lease" the lands were to befall on the sons; it was to so befall upon the "*then* surviving sons"; the payments were to be made "at such a time" (the expiration of the lease); and if one or two of the sons should be "at that time or within a year from that time" (meaning always the expiration of the lease)

unable to pay, the non-shortcoming sons could perform.

It is equally clear that the testator intended that upon performance by the sons of the condition named they were to have all the lands mentioned in Article "Third." His words on that point are utterly unambiguous. Did not the testator act in good faith towards his sons when he prepared or directed the preparation of Article "Third"? Is there any reason to doubt that he did? He certainly intended to prescribe a condition capable of performance. If he said that the payments need not be made until the expiration of the lease (and he did) and if he said that the payments must be to all of the daughters who survived him (and this immediate discussion assumes that he did), then he must necessarily have intended that as to any daughter who survived him but did not survive the expiration of the lease the payment could be made to her heirs or assigns. He certainly has not provided anywhere in the will, directly or indirectly, in clear or in hazy language, that as to any such daughter, her heirs or assigns shall retain her one-ninth (or other fractional) interest in common with the sons as the holders of eight-ninths (or other fractional interest). To now declare by construction that one daughter has escaped with a one-ninth interest from the operations of Article "Third" and that the sons have eight-ninths only and cannot acquire the other ninth would be to add a provision wholly foreign to the purposes and intent of the testator. No trace of any

such intention can be found anywhere in the will. The intention expressed was that either the sons should have *all* the land under Article "Third" or, if they failed to perform, the nine children should have one-ninth each under Article "Fourth." And the only failure of performance which the words of the testator recognize is the financial inability of the sons "to furnish, produce or raise the necessary amount" of money. Not a word is said about their inability to perform the highly acrobatic feat of starting out after the expiration of the lease to pay personally to a daughter who died some years before the expiration of the lease. Following the assumption of the court below that the deceased daughter had at her death a descendible interest, that interest in the hands of the heirs was always subject to defeasance upon payment to them of \$5000. If it is assumed that the heirs could and did inherit the daughter's interest, what is the difficulty in holding that they could and did inherit it with the same quality of defeasibility which attached to it in the daughter's hands? None, it is submitted. If they inherited the interest at all, they inherited precisely what the mother had and no more, and they inherited her one-ninth subject to the same burden or weakness that it was subject to in the mother's hands, and they inherited the same right to be paid the \$5000 which their mother would have received had she survived the lease. There is absolutely no legal impediment to such a construction. To so construe the provision is, upon the assumed facts, to give

meaning and life and workability and sound sense to the provision and to credit the testator with good faith and the desire to talk honestly to his sons when he talked to them in Article "Third." To hold that Catherine's heirs cannot be paid the \$5000 and have their interest thereby defeated is to say that the testator did not mean all that he said when he said, as he did, that it was his "sincere wish and will" that his lands (which must mean *all* his interest therein) should "befall" upon his sons; when he said that he was giving to his sons the "right to buy *the whole of my lands*" then leased to the Kilauea Sugar Company; when he said that "by doing so," i. e., by performing the condition which he had just stated, his sons would "enter into FULL POSSESSION of ALL my lands"; and when he said that if the sons "comply and fulfill the above conditions" their "*right and title*" to all the lands "will be *undisputable*." When the testator said these things, was he indulging in any mental reservations such as "I mean, of course, that your title will be undisputable as to the undivided eight-ninths or other lesser interest that you may acquire"; or "By 'my lands' I mean, not all of them but only so much as you shall get"; or "When I say that you shall have the right to buy the *whole* of my lands, I mean, of course, that under some circumstances you may, even if you stand ready to pay all I require of you, get less than the whole of my lands"? Certainly not.

The majority of the court below in its opinion cited authorities which define conditions precedent and

conditions subsequent and which hold that conditions subsequent must be strictly performed and that a condition subsequent that has become impossible of performance is void. As general statements of law, these may be assumed to be correct, but the mere declaration or assumption of the law in these respects is of no assistance in determining what the testator meant by his will. The latter is the important question. What does the language of the testator mean? Did he create a condition subsequent? Did he mean that after a daughter had survived the period named, whatever it was, her children and heirs after her death would not be entitled to the \$5000 or that under those circumstances the sons would not be entitled to pay to such children and heirs? If he did mean this, where is the language that shows it? Upon these points the majority opinion below is silent. The majority contents itself with the mere assertion that the condition has become impossible of performance. All that it says on the subject by way of stating its conclusion and its reasons is this: "The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease rendered the condition subsequent whereby the estate which vested in her should be divested impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of \$5000, a privilege granted to the sons, or one or more of them, by the testator."

A careful examination of the opinion will show nothing more by way of a statement of reasons in support of the view that the condition was that the payment should be made to the daughters personally in their lifetime and that it could not be made to the heirs of a daughter who by living the required length of time had become a "surviving" daughter within the meaning of Article "Third." The majority opinion is neither well reasoned nor convincing. If the intention of the testator was to permit payment to the daughters only even after their survivorship of the prescribed period when their right to the \$5000 had become absolute, it should be possible to point definitely to some language in the will supporting that view.

Assuming that by the term "surviving daughters" the testator meant to include those daughters only who should survive the expiration of the lease and assuming that Catherine had survived the expiration of the lease and had lived for one week thereafter and then died, would not the sons under the terms of the will be entitled within the year named to pay the \$5000 to her heirs? They certainly would be. The "sincere wish and will" of the testator was indubitably expressed that all of his lands should befall upon his three sons upon their making the payments in question, and the sons were by the testator given the whole of one year within which to make the payments. The mere manner of the making of the payments is a much less important matter which must be made to conform to and to carry

out the general intent so clearly expressed. In the supposed case the daughter having survived the period prescribed there could be no further doubt of her right to the \$5000 and that right would descend to her heirs with all of the same characteristics and qualifications which attached to it in the hands of Catherine, and one of them was that the sons had the right to make that payment and thus cause the lands and every interest therein to befall on them.

To hold that the condition is impossible of performance and that the \$5000 cannot be paid to the heirs of Catherine on the theory that the payments can be made to *living* daughters only, the result is that the absolutely clear intent of the testator is frustrated. It cannot be urged too often, and we make no apologies for urging it again, that the testator succeeded in making his intention entirely clear in Article "Third" that at the expiration of the 25-year lease he wanted all the lands mentioned and every interest therein to go to his three sons upon two conditions and two only, namely, that they (or one or more of them) should survive the 25-year lease and that they should have the financial ability to make the \$5000 payments. Both conditions have been performed. The sons did survive the 25-year lease. They are all living today. The sons have paid five of the daughters; they stand ready to pay to the heirs of the sixth if this court shall say that under the will Catherine was a surviving daughter and that the heirs of Catherine are entitled to such payment; and under these circumstances, the testa-

tor says in Article "Third" that *all* of his lands are to befall upon the three sons and that the sons' "right and title will be undisputable."

If upon the assumption that the words of survivorship ("surviving daughters") relate to the death of the testator the correct view is that the condition is impossible of performance because Catherine died before the expiration of the lease, the result simply shows that the assumption just mentioned is a false one. If the two things conflict, to wit, on the one hand, the legal classification which the court below has accorded to the estate of Catherine at the time of her death and of her children thereafter and the assumption that the words of survivorship relate to the testator's death, and, on the other hand, the intention of the testator as clearly gathered from Article "Third" of the will without reference to the legal nomenclature attached to this, that or the other estate, then the one thing which must yield to the other and which must be thrown out and abandoned is the legal classification of the estate of Catherine and the construction as to the period to which the survivorship refers. Upon all the authorities, upon common sense and upon reason there can be no two ways of looking at this particular point. The general or primary intention of the testator, clearly and easily gathered from the will as a whole, must prevail over the language of any particular paragraph or sentence which at first sight may appear to be inconsistent with the primary intent. "In case of doubt a will should be construed in favor of a gen-

eral or primary intention rather than a particular or secondary one; and where in such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator's general intention as ascertained from all the provisions of the will, the general intention must prevail." 40 Cyc. 1393. And see, for example, *Fidelity Trust Co. v. Bobloski*, 228 Pa. St. 52, 54; *Sheetz's Appeal*, 82 Pa. St. 213, 217; *Phelps v. Bates*, 54 Conn. 11, 15; *Baxter v. Baxter*, 122 Mass. 87; and *Barrett v. Marsh*, 126 Mass. 213, 216. See also dissenting opinion of Chief Justice Robertson in the case at bar. (Tr., p. 90.) The intention of the testator is the court's guiding star and it must be adhered to and preserved and complied with unless indeed there is some rule of law which that intention, if carried out, would contravene, and that no one claims and no one can successfully claim is the case here.

All rules as to so-called strict construction of conditions subsequent and liberal construction of other conditions are intended as mere aids in the ascertainment of the intention of the testator. The moment that they not only fail as such aids but serve to frustrate the testator's intention, the court should refuse to enforce or apply them.

If the correct answer be, upon the assumption that the words of survivorship relate to the death of the testator, that the condition is now impossible of performance because Catherine died before the expiration of the lease, then that difficulty simply empha-

sizes, and tremendously emphasizes, the correctness of the contention which we have advanced and argued for first, last and all the time, that the words of survivorship ("surviving daughters") do not relate to the time of the death of the testator but do relate to the expiration of the lease. Adopt that construction and all difficulty disappears. Adopt that construction and no acrobatic feat would be required of the sons who were told that they need not start out to make the payments until after the expiration of the 25-year lease, were told, upon the lower court's view, that the payments must be to living daughters personally and then were told that they must also pay to any daughter or daughters who survived the testator but did not live until the expiration of the lease. We find it impossible, we confess, to discover any ambiguity or doubt upon the point that the sons need not pay until the expiration of the lease or upon the point that it was the sincere wish and will of the testator that all of the lands mentioned, including every interest therein, in fee simple absolute, unencumbered by any outstanding interests, should go to his three sons provided only they survived the 25-year lease and were financially able to pay and did pay to the surviving daughters. We find ourselves unable, we further confess, to discover any lurking fraud on the testator's part, to discover, in other words, that he did not unequivocally intend and contemplate that what he was asking his sons to do (in the condition of payment which he prescribed) was something which they could do, was something

which under the rule or measure of survivorship which he prescribed as to the daughters the sons could do.

We submit that the testator in Articles "Third" and "Fourth" contemplated only two alternatives, the one under Article "Fourth" that the nine children, or their heirs or assigns respectively by way of representation, should have an undivided one-ninth each if none of the sons did survive the 25-year period or if none of them was financially able and willing to make the payments prescribed to the surviving daughters and the other under Article "Third" that if one or more of the sons should survive the lease and should be financially able and willing to pay, such son or sons should have all of the land. We submit further that not the slightest straw of support can be found anywhere in the will for a third alternative by way of a cross between these two whereby the sons, although surviving the lease and although financially able and willing to pay, should have less than the whole land and less than every interest in the land and one or more of the daughters should have an interest or interests in the land in common with the sons. If we are correct in this assertion that such a third alternative finds no support whatever in the language of the will, it is but another fact showing that our construction is not only the correct one but the only correct one when we say that the words of survivorship as to the daughters refer to the expiration of the 25-year lease.

Authorities on this question of the alleged impos-

sibility of performance we have not cited because it seems to us that the question does not admit of citations. It is a pure question of construction. What did the testator intend? What he intended is to be learned from a study of his words and not from a study of general rules about "strict construction" or liberal construction of conditions subsequent or conditions precedent.

12.

ASSIGNABILITY OF SONS' INTERESTS.

In view of the statement in the opinion of the majority of the court below that, referring to the right of the sons to pay the sums named and thus become the "undisputable" owners of the land, "the privilege granted seems personal" and non-assignable, the subject of the assignability of the interests and rights of the sons prior to the expiration of the lease and prior to performance of the condition is here considered.

Under the majority opinion in *Bertelmann v. Kahilina*, 14 Haw. 378, the nine children took present vested estates in fee, defeasible as to the interests of the daughters and shortcoming sons or son upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent executory devises as to such interests. The only other possibility of construction, as to the devise to the sons, is that they took under the will contingent remainders, contingent as to each of them,

first, upon his surviving the expiration of the lease, and second, upon his making the payments above mentioned within the required time. In other words, the only three possibilities that need be considered are that each of the sons had either a vested estate or, second, an executory devise in the nature of a contingent remainder, or, third, a contingent remainder.

In entering upon this discussion we adhere to our view, that in the construction of the words "surviving daughters" it is immaterial whether the estate given to the daughters is vested or contingent, since the words can have but one meaning whether the clause in which they occur be regarded as a condition of divesting or a condition of vesting.

12-A.

ASSIGNABILITY OF VESTED REMAINDERS.

If each of the sons and in so far as each of the sons took under the will a vested estate there is no doubt that that estate was alienable, descendible and devisable. The authorities are all in harmony on that point. It is too well established to permit of the citation of authorities.

12-B.

ASSIGNABILITY OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES.

As between contingent remainders and executory devises in the nature of contingent remainders, none

of the authorities, as far as we have been able to discover, draw any distinction. Whether the cases tend the one way or the other on the subject of assignability under certain circumstances, the same is said in each of them with reference to these two classes of interests. See, for example, *Medley v. Medley*, 81 Va. 265, and *Watson v. Smith*, 110 N. C. 6, 9.

Nor is there any doubt that assignments of contingent remainders, irrespective of whether the contingency related to the existence of the devisee at a particular time or to the happening or failure to happen of a separate event, were operative at the common law by way of estoppel at least and that after the happening of the event which transformed the contingent remainder into a vested estate the estoppel was deemed to have operated to create an estate, or, rather the deed which until then was operative only by way of estoppel became in its substantial results operative as a deed.

Foster v. Hackett, 112 N. C. 546;

Doe v. Oliver, 10 B. & C. 181;

2 Washb. R. P. 528, 529.

Again, assignments of contingent remainders irrespective of the nature of the contingency have always been in England recognized and enforced in equity; that is to say, that although such assignments may have been in certain cases disregarded in the courts of common law they were always regarded as valid in courts of equity and the method of enforcement was either by declaring the grantor to be a trustee for the grantee or by regarding the deed

as an executory contract. In the latter event, if the deed was found to be for a valuable consideration and free from fraud, equity would, after the vesting was accomplished by the happening or failure to happen of the contingency, decree specific performance of the executory contract.

16 Cyc. 653;

Hannon v. Christofer, 34 N. J. Eq. 459;

Wilcox v. Daniels, 15 R. I. 261, 263;

Mudge v. Hammill, 21 R. I. 283, 286;

4 Kent 261, 262;

1 Tiffany, R. P., Section 129, p. 306;

Wright v. Brown, 116 N. Car. 26;

Bayler v. Com., 40 Pa. St. 37.

Either one of these two views, i. e., (a) that such assignments operate by way of estoppel and (b) that they are recognized and enforced in equity, suffices to dispose of this case favorably to the plaintiff in error in so far as the question of assignability is concerned because at best no one other than the sons could possibly be in a position to successfully dispute the assignments or conveyances and because if the assignments are recognizable and enforcible in equity the defendant is enabled in that forum to protect the conveyances to her, each of which was for a valuable consideration and free from fraud. The mere fact that the construction of the will is being sought by means of a submission upon a case agreed cannot operate to lessen the rights of this plaintiff in error with respect to the assignability of the interest

of each of the sons or place her in a worse position than she would have been in were she now before a court of equity. Not only is this not disputed by the defendants in error but they have joined us in writing and orally in asking that neither technical defects in the submission nor the fact that the adjudication of the court is being sought by means of a submission shall be held against either of the parties herein.

Even at common law, contingent remainders and executory devises by way of contingent remainders were undoubtedly assignable, descendible and devisible when the contingency or uncertainty was, not as to the existence or survival at a stated time of the person who was to take, but as to the happening of some other event. (All contingent remainders and executory devises, irrespective of the nature of the contingency, were assignable in equity in England.) If, as it is said, a person is in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, as where the devise is to A for life and the remainder to B, but if B dies before twenty-one, then remainder to C, the contingent interest in C is assignable; and the ground given for so holding was that in the event last stated, the devisee had a possibility coupled with an interest and not a mere possibility.

Cases are to be found holding that if the uncertainty or contingency is in the person who is to take upon the happening of the contingency, as where the

devise is to A for life with remainder to his heirs or to such of his children as shall survive him, the interest of the contingent remaindermen is a mere possibility and not a possibility coupled with an interest. It is respectfully submitted that the reasoning of these cases and the distinctions which they attempt to draw are unsound. If a remainder to A contingent upon B's reaching twenty-one or upon his dying before thirty without leaving issue surviving him is a possibility coupled with an interest, why in the case of a remainder to A contingent upon his (A's) surviving B or any other stated period of time is it any the less a possibility coupled with an interest? The one is not a mere possibility any more than the other. The hope or expectancy of an heir apparent is a mere possibility. The hope or expectancy of one who has been named a devisee in the will of another who is still living is a mere possibility. The hope or expectancy of a son or daughter, a parent or other relative that an aged ancestor will leave him his property or a part of it is a mere possibility. In each of these instances the hope and the expectancy can be destroyed absolutely by the act of the ancestor in making a will to another. But where there is a provision in a will or deed naming A, B or C, or all of them, as the recipients of a contingent remainder, whatever the contingency may be and whether strictly a contingent remainder or an executory devise by way of contingent remainder, and the testator or grantor has died, a legal act has been done, limiting and defining the rights of the devisee, and

placed of record which cannot be withdrawn or destroyed or rendered nugatory except by the contingency happening adversely to the vesting of the contingent remainder or executory devise. What can it matter on principle whether the contingency consists of one uncertainty or of another uncertainty or of two uncertainties, whether it consists in an uncertainty as to the death of another or as to the survival of the issue of that other or whether it consists in the survival at a certain time of the contingent devisee himself? What can it matter on principle whether the adverse happening of the contingency will vest the remainder in another person or whether it will prevent the remainder vesting in the person named without vesting it in anyone else? In each instance the devisee under consideration finds finally that his contingent interest has failed to vest. In each instance, he had a chance of its vesting. In each instance, his chance was limited in and by a written instrument validly executed by the owner of the land. In each instance, neither the former owner nor any one else can, after the will becomes operative as a will, deprive the devisee of the chance and right which he has of obtaining the property. In each instance, the devisee has something substantial, more than a mere possibility, which is marketable and which, in other words, business men of sound sense and experience are prepared to pay for and acquire in advance of the happening of the contingency. In each instance, there is an uncertainty as to whether the devisee will ever take but in each in-

stance also the devisee has by a lawful act, grant or limitation of the original owner of the property acquired a right in that property which is indestructible and which is surely more than a mere hope or expectancy. In each of the instances just above mentioned, the failure of the contingency to happen in the right way will make it impossible for the estate to vest in the devisee whether he be specifically named or be one of several named as a class and whether the contingency be as to his survival or as to some other event. In a devise to the heirs of A who is now living, there is always some ascertained person in being who would take if the contingency would happen now, and that seems to be all that is required in the case of a possibility coupled with an interest. In the case at bar the devise is to three named persons, all of whom were in being at the testator's death.

“The authorities all seem to be agreed that a contingent remainder is alienable when the remainderman is ascertained and the uncertainty which makes it contingent is in the event on which it is limited to take effect, because in such case the possibility is coupled with an interest. If the remainderman is not ascertained, then, according to some authorities, there is not a possibility coupled with an interest, but only a bare possibility, which is not subject to sale or transfer. These decisions do not appear to be sound in principle, because in almost every conceivable case of a contingent remainder of this sort, as distinguished from limitations to persons not in being, there is some ascertained person in whom the remainder will vest, if the existing conditions remain unchanged until the happening of the contin-

gency or the determination of the particular estate, as, for instance, a limitation to the children of the life tenant living at his death, or to the right heirs of a living person, etc. Under such circumstances it seems very clear that a person so situated with respect to the remainder has just as much of an interest as if the remainder had been specifically limited to him on a contingency. The only difference is that in the one case a change of circumstances may vest the remainder in another person, while in the other case the contingency may prevent the remainder from vesting in the person named, without vesting it in any one else. On reason, therefore, in any case where the remainderman is not ascertained, but where there is a person in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, such person has a possibility coupled with an interest which he may transfer to another, subject, of course, to the same contingency by which it is affected in his hands. And this view is amply supported by authority as well as reason." 24 A. & E. Ency. 406.

The common law rule, if it can be called that, that contingent remainders are not assignable where the uncertainty is as to the person who is to take, e. g., where the devise is to A for life and at his death to B, C and D or to such of them as shall survive A, has been abolished by statute in many states. In other states without the aid of statute and purely on principle the rule is rejected as unsound and also because it is inconsistent with the conditions and tendencies of the present day.

In *Jones v. Roe*, 3 D. & E. (Term Reports) 88, 93-96, with opinions written by four judges, it was held that a possibility coupled with an interest is devis-

able. Chief Justice Kenyon said that it was "high time that this question should be understood to be completely at rest." No distinction was made between executory devises and contingent remainders but on the contrary both were expressly held to be devisable. The court recognized that there had been considerable hesitation on the part of English courts in holding executory devises to be transmissible but declared that the old doctrine at the date of *Jones v. Roe* was exploded. "Executory devises are not naked possibilities but are in the nature of contingent remainders and there is no doubt that such estates are transmissible and consequently devisable." Space does not permit of lengthy extracts from the opinions but they are all worthy of examination. The fact that the English statute of wills passed in 32 Hen. VIII (1541) enabled persons "having any manors, lands, etc., to devise" was deemed by the court significant. It was held to mean that any person having an interest in the lands could devise and it was then held that a contingent remainder was a possibility coupled with an interest. It is true that in that particular case, the contingency was as to whether the first taker should attain the age of twenty-one years and not whether the later taker should survive a stated period, but in the last analysis even in such a case as that is there not the same sort of doubt, no greater and no less, as to who the taker after the first estate is to be? For if the first taker does reach twenty-one he takes and if he does not reach twenty-one the other takes. Is there

not as much doubt and uncertainty under those circumstances as to who the taker is to be as in a case where the contingent remainders or executory devises are declared to be to A, B and C, or to such of them as shall survive at a stated time? In either event, until the stated time arrives, it is impossible to know with absolute certainty which contingent interest will vest; but in either event likewise each of the contingent devisees has had limited to him by a legal will or deed as the case may be, a well-defined right which is indestructible by the testator or grantor and which is more than a mere possibility.

Moreover if the English statute of wills meant what the court in *Jones v. Roe* said it meant, and it certainly did, our Hawaiian statute is at least as effective in the same direction when it provides that every person may dispose of "his or her estate" by will. *R. L. Haw.*, Sec. 3258. This cannot include less than all of the testator's property or rights of property.

The modern tendency is to depart from the old unfounded distinctions and the old rules based upon conditions in England which no longer exist. In *Putnam v. Story*, 132 Mass. 205, the devise was to the daughter Frances for life "and at her decease the capital sum to be equally divided among the heirs of my said daughter share and share alike," and the question was "whether the children of Frances took any interest during the life of the testator's widow and of their mother which was assignable." It was recognized that the children of Frances did not take

a vested remainder but that their interest was in the nature of a contingent remainder. The children were held to have "a vested interest in a contingent remainder" which was assignable and which would pass to an assignee in bankruptcy or insolvency subject to the same contingency in the hands of the assignee as in those of the assignor.

Where the testator (Sawyer) provided that "when the youngest living child arrives at the age of twenty-one years, then one-half of the property shall be divided equally among all the children living," the court said, "According to numerous recent decisions each child of Mr. Sawyer took an interest in his estate which was alienable before the youngest child became of age. It was not a mere possibility but a fixed right to take as purchaser under the devise which could be defeated only by his death before the date for distribution or by Mrs. Sawyer's disposing of the property. Assuming that she had an implied power to sell and use the proceeds, this would not defeat the alienability of the sons' interest. The alienation, of course, would be subject to all contingencies." *Wainwright v. Sawyer*, 150 Mass. 168, 170. In the case last cited, the court correctly noted that each child's was a *fixed right* and it was fixed simply because it had been lawfully declared or limited in a way (by will) that took the child out of the class of those who have a mere hope or expectancy which can be shattered at will by the ancestor and was placed in the class of those whose right is so defined and limited by the ancestor that after his death it cannot

be terminated or lessened. Under such circumstances, as that court correctly observed, the right is not a mere possibility. It rises to the dignity of an interest.

In *Dunn v. Sargent*, 101 Mass. 336, the devise was for the benefit of Benjamin C. for life and at his death to his children "but if he should die without children, then to such of his brothers and sisters as might survive him, and if either should die in his lifetime leaving child or children, such child or children should take the parent's share." In holding that the interests of the brothers and sisters were contingent remainders, the court said:

"The contingency upon which the vesting of their interests in possession depended was the event of their brother Benjamin's dying without leaving children, during their lifetime. Their interests were not indeed transmissible or devisable because the gift in remainder was to such of them only as should survive Benjamin. But though not vested in possession, and subject to be defeated by the death of the legatee in remainder during the life of Benjamin or his children, they were vested in right from the death of the testatrix, and capable of alienation, subject of course to the same contingencies in the hands of the assignees as in those of the assignor." *Ib.*

"The interest of the petitioner in the estate of her grandmother, though a contingent remainder which would not vest in possession unless and until she survived her parents, was yet vested in her in right from the death of the testatrix, capable of alienation by her during the life of her parents, * * * subject to the same contingencies in the hands of the assignee as in those of the assignor." *Belcher v. Burnett*, 126 Mass. 230.

"A contingent interest which nothing but the death

of the bankrupt can prevent vesting in him may, without any forced construction, be regarded as a 'right of property.' " *Nash v. Nash*, 12 Allen 345, 348.

"It is true as stated in the argument that a possibility cannot be transferred at law. But by a possibility we mean such an interest as the chance of succession which the heir apparent has in his ancestor's estate; which a next of kin has of coming in for a part of his kinsman's estate; which a relation has of having a legacy left him, etc. Such interests as these, we conceive, are the true technical possibilities of the common law." *Fortescue v. Satterthwaite*, 23 N. Car. 567, 570. The sons' interests in the case at bar were not in that category.

In *Bodenhammer v. Welch*, 89 N. Car. 78, the devise was to the widow for life "and after her death to be equally divided between all of his" (the testator's) "children that are then living. * * * Had the plaintiff, Randall Bodenhammer" (one of the children of the testator) "such an interest in the land described in the petition as was subject to be sold or disposed of by him? His interest was contingent depending upon his surviving his mother." (In the case at bar the sons' interests under paragraph "Third" depended upon their surviving the expiration of the lease.) "It was not as contended a mere possibility but an estate in the land, an executory devise or rather a contingent remainder which is a certain interest. * * * That executory devises, contingent remainders and other possibilities coupled with an interest may be assigned is maintained in *Jones v. Roe*, 3 D. & E. 88," and other cases there

cited. The conclusion was that the son's contingent interest was assignable.

A remainder which was limited by the language "and upon their deaths the said residue to be divided among my nephews and nieces then living that are now or may before that time be born," was held to be contingent and assignable although dependent upon the survivorship of the devisees at a stated time. *Grayson v. Tyler's Adm'x*, 80 Ky. 358, 358. The claim was advanced in argument that "a contingent remainder is not capable of alienation where the person who is to take is not ascertained." The court said, *inter alia* :

"The contingency upon which the claim of the appellant could be defeated, and no other, was that of his dying before the life tenant. * * * This nephew was living at the testator's death, and had an interest in the estate devised that no one could divest him of by will or deed and nothing could defeat the devise, so far as he was interested, but the happening of the contingency, viz., his dying before his mother. * * * There is a manifest distinction between this case and a mere possibility, such as the expectation or presumption that the child will take from the father. In the latter case the possibility is not coupled with an interest. * * * It is plain, we think, when an estate is devised to one in being, his right to depend upon his surviving another is something more than a mere naked possibility. The death of the primary devisee will" (not?) "alone vest him with the absolute title, but yet the contingent interest is something that no one can divest him of, and is certainly of more value and of greater interest than the mere expectancy or possibility that someone may die without a will or without conveying his property or leaving property that his next of kin may

inherit. * * * There is a right and an interest in such a devise that is far more certain and fixed than a mere naked possibility. All others are excluded for the time being from any right to his contingent interest, and this right of his, by reason of the devise, may ripen into a perfect title. Besides, the tendency of modern decisions, as well as that in legislation, is to facilitate the transfer and alienation of such estates. * * * It follows, therefore, that the contingent interest of the appellant was the subject of transfer and sale, and that John Tyler became the owner by reason of the agreement of September 26, 1851."

Discussing a remainder to those who would be the "heirs" of A at a certain time, the court in *MacDonald v. Bank*, 123 Iowa 413, gave helpful definitions of the terms "possibility" and "interest" and held that the "heirs" as contingent remaindermen had more than a mere possibility, that their "interests" were not mere expectancies. They had their foundation in the "provision," "the legal act" of the will.

In Missouri, also, without the aid of a statute, the common law view as to non-assignability of the class of contingent remainders immediately under consideration has been rejected. In *Godman v. Simmons*, 113 Mo. 122, 129, the estate of the remainderman "was contingent upon the death of their mother and their surviving her. The first event was sure to happen and they were sure to take if they would survive her; but whether they would survive her and thus become heirs of her body was uncertain and hence the interest they had was no more than a

contingent remainder and a contingent remainder of that class that grows out of the uncertainty of the persons to take at the determination of the life estate." (This is the same class in which under some of the authorities the sons in the case at bar would fall.) "Such an interest was not alienable at common law before the contingency happened. * * * This rule of the common law seems to have been abolished in England by 8 and 9 Victoria, Chapter 106, * * * and by statute in" certain states.

"In this state, while we have no similar express statute our statutes do provide" for conveyances of "any estate or interest therein," for the sale of all "estates and interest" under execution and for the partition of land at the request of any person "having an interest" in real estate.

"This rule of the common law seems to be inconsistent with the general scope of our statutes regulating the disposal of real estate and not in harmony with the genius and spirit of our institutions which brooks no restraint upon the power of the citizen to alienate any of his property. We are pre-eminently a trading and commercial people; our lands are our greatest stock in trade and the whole tendency of our laws is to encourage and not restrain their alienation. The spirit and genius of the feudal system and the common law were exactly the reverse and we do not think this now almost obsolete common law rule ought to obtain in this state."

All of this can be said with equal force in Hawaii. Elsewhere in this brief are enumerated legislative acts and judicial decisions showing an entire departure by Hawaii in its treatment of property and its

alienability from the views and methods prevailing at the common law of England,—a departure, let it be remembered, which took place long before the enactment of section 1 of the Revised Laws, adopting, with qualifications, the common law of England as the law of Hawaii. It would certainly come as a great surprise to laymen and lawyers alike, in Hawaii, to now learn that the genius and spirit of our institutions long prior to 1893 was not in favor of the freedom of alienation of land and of all manner of estates and interests in land.

The Missouri court went on to say:

“The doctrine that contingent interests in real estate cannot be conveyed at law remained as one of the last relics of a system of which the policy was to hinder the alienation of land,” and it might have added as one of the last relics of the feudal system. That feudal system and its methods of dealing in land have been so largely repudiated in Hawaii as to require the further repudiation of any portions not heretofore specifically disowned. “A contingent remainder is not an estate in lands since it is merely the chance of having; but it is an *interest* in land and one which long remained inalienable simply because it had never been thought worth legislating about; so that, as Williams says (Williams on Real Property, 257), ‘the circumstance of a contingent remainder having been so long inalienable at law was a curious relic of the ancient feudal system.’ * * *

This ancient common law rule—that contingent remainders are inalienable, like the rule that choses in action are not assignable—does not obtain in this state; not because there has been a positive statute abolishing these rules but because they are out of harmony with its general affirmative statutes upon these subjects and long since have ceased, if they

ever did exist, as rules governing the action of its citizens in the business relations of life.” *Godman v. Simmons*, 113 Mo. 122.

In contending that contingent remainders are descendible and devisable, we recognize that the rule is always subject to the exception referred to earlier in this brief in discussing the case of *Winslow v. Goodwin*, 7 Met. 363, that where the very existence or survivorship of the devisee at a time stated is essential to the vesting of the estate, the devisee’s interest cannot, if he fails to survive as required, descend or be devised because at his death there is nothing left to descend or to be devised.

As to the assignability of contingent interests, see also the following:

Whelen v. Phillips, 151 Pa. St. 312;
Brown v. Fulkerson, 125 Mo. 400, 403;
 2 A. & E. Ency. 1010, 1011, 1026, 1031;
 22 A. & E. Ency. 1034;
 4 Cyc. 14;
Thompson v. Hoop, 6 Ohio St. 480;
Winslow v. Goodwin, 7 Met. 363;
Gardner v. Hooper, 3 Gray. 398;
Heard v. Reed, 169 Mass. 220;
Sikemeier v. Galvin, 124 Mo. 367.

The case of *Graves v. Spurr, Trustee*, 97 Ky. 651, was cited below on plaintiffs’ behalf. In that case the court did venture some remarks as to the non-descendibility and non-devisability of contingent remainders and executory devises where the person to

take is uncertain. If what is there said on the subject can be regarded as an actual decision the case falls within a class which was dealt with hereinabove and which has been shown, as we hope, to be unsound in principle and contrary to the law of Hawaii. But it is submitted that the remarks in *Graves v. Spurr* on the subject are purely *obiter dicta*. In that case the particular remainder under consideration was held to be descendible. There was no uncertainty as to the person who was to take. "This trouble," the court said, "does not arise in this case." P. 658. The uncertainty as to the person arises, it said, where the estate is given over, after a life estate, to the survivor of a class of persons "but that is not the case here." Syllabus, p. 651. The devise over, after the life estate, was "to her child or children, and, if she leave none, to her brothers and sisters." P. 643. There were no words of survivorship in the will there under consideration. The facts and circumstances were materially different from those in the case at bar.

12-C.

THE COMMON LAW RULE, IF ANY, IN RESTRAINT OF ALIENATION IS NOT LAW IN HAWAII. COMPLETE FREEDOM OF ALIENATION IS THE RULE AND POLICY IN HAWAII.

In Hawaii the common law rule, if it was such, can have no existence because:

1. Our law, written and unwritten, favors and

since 1846 always has favored freedom in alienation of all lands and interests in land. Opposing counsel will not, we think, deny this. Starting with a feudal system somewhat similar to that which prevailed in old England did not the King in 1846, educated and urged thereto by the foreigners who had made their homes in these islands, abolish the old system of land tenures under which the individual had no enforceable rights either of ownership or of alienation and substitute in its place substantially the system which prevails in all modern countries of absolute individual ownership with the accompanying right to lease, mortgage, sell or otherwise alienate? If there were nothing else in the history of these islands that one act alone would constitute a clear showing of the policy of freedom of alienation. See *Rooke v. Hospital*, 12 Haw. 391.

But the decisions of the courts of Hawaii when considering various common law rules and principles with reference to the ownership and disposition of property contain many acts and declarations indicative of the same general policy. See, for example:

Henrique v. Paris, 10 Haw. 408;

Thurston v. Allen, 8 Haw. 392 (399) ;

Van Giesen v. Magoon, 20 Haw. 146;

Rooke v. Hospital, 12 Haw. 391.

Other cases are referred to hereinafter.

2. The Hawaiian statute of wills (R. L., Sec. 3258) declares that "Every person of the age of

eighteen years and of sound mind may dispose of his or her estate both real and personal by will" which means, if it means anything, all his or her estate and of all kinds. This is inconsistent with any rule of non-devisability. See *Rooke v. Hospital*, 12 Haw. 391, 2.

3. The Hawaiian statute on the descent of property (R. L., Sec. 3243) provides that "whenever any person shall die intestate without this Territory, his property, both real and personal, of every kind and description shall" (with exceptions immaterial hereto) "descend to and be divided among his heirs as in this chapter prescribed." This includes, as the express language says, property "of every kind and description" and is inconsistent with any rule of non-descendibility.

4. By Hawaiian statute, assignments of choses in action are recognizable at law. R. L., Sec. 2372. Such assignments were not recognized at the common law of England. The doctrine of non-assignability of choses in action has been repudiated by the Supreme Court. See for example,

In re Kealiiahonui, 9 Haw. 6;

Mossman v. Government, 10 Haw. 421, 436;

Brown v. Spreckels, 18 Haw. 91;

Van Giesen v. Magoon, 20 Haw. 146.

5. Under the Hawaiian statutes of eminent domain, the state can take contingent interests of all kinds. See, for example, R. L., Secs. 670, 672, 3, 7, and *Magoon v. Brash*, 11 Haw. 204. If any contin-

gent interest can be taken in invitum, so also it should be possible for the owner to dispose of it of his own acord.

6. Every interest in property is taxable and may be levied on and sold in satisfaction of taxes. See, for example, R. L., Secs. 1241, 1242, 1292.

7. That the feudal system of England, which gave rise to so many of the doctrines of the common law and in particular to the doctrine of non-alienability of property has no place in Hawaii and that, therefore, the doctrines arising out of and dependent upon that system themselves have no proper place in Hawaii, has been decided in several of the decisions of the Supreme Court of Hawaii.

Awa v. Horner, 5 Haw. 543;

Rooke v. Hospital, 12 Haw. 391, 394;

Branca v. Makuakane, 13 Haw. 499;

Thurston v. Allen, 8 Haw. 396;

Godfrey v. Rowland, 16 Haw. 388.

It has been well said in several of these cases that the reasons for the rule failing the rule itself cannot exist and the doctrines dependent upon that system must be deemed to be contrary to Hawaiian judicial precedent or Hawaiian usage.

Branca v. Makuakane, 13 Haw. 499;

Henrique v. Paris, 10 Haw. 418;

Van Giesen v. Magoon, 20 Haw. 146.

8. The rule of the common law that a conveyance cannot be made of a freehold estate *in futuro* has been repudiated.

Puukaiakea v. Hiaa, 5 Haw. 484;

Kuuku v. Kawainui, 4 Haw. 515.

9. The doctrines of champerty and maintenance have no place in Hawaii.

Mossman v. Government, 10 Haw. 421;

Ninia v. Wilder, 12 Haw. 104;

Brown v. Spreckels, 18 Haw. 91;

Henrique v. Paris, 10 Haw. 408;

Van Giesen v. Magoon, 20 Haw. 146.

10. A deed may be made by a disseisee to a stranger.

Mossman v. Government, 10 Haw. 421;

Ninia v. Wilder, 12 Haw. 104;

Brown v. Spreckels, 18 Haw. 91;

Van Giesen v. Magoon, 20 Haw. 146.

11. Estates tail do not exist in Hawaii.

Rooke v. Hospital, 12 Haw. 375.

12. Conditional fees likewise do not exist in Hawaii.

Ib., 375.

13. In Hawaii, there is no necessity for livery of seizin.

Puukaiakea v. Kiaa, 5 Haw. 484;

Judd v. Ladd, 1 Haw. 17;

Brown v. Spreckels, 18 Haw. 91;

Van Giesen v. Magoon, 20 Haw. 146.

14. Obsolete parts of the common law are not in force in Hawaii.

Mossman v. Government, 10 Haw. 421.

15. The doctrine that there can be no limitation over of a chattel has been rejected in Hawaii.

Damon v. Dickson, 7 Haw. 694.

16. So also has the doctrine of the destruction of contingent remainders through the merger of estates.

Godfrey v. Rowland, 16 Haw. 377;

Evans v. Bishop Trust Co., 21 Haw. 74.

17. Any and all technical rules of the common law which hinder the construction of a will in such a way as to enforce the intent of the testator are disregarded.

4 Haw. 515, 517;

Thurston v. Allen, 8 Haw. 392;

Rooke v. Queen's Hospital, 12 Haw. 375, 399.

18. The word "heirs" is not necessary in Hawaii to convey a fee.

Branca v. Makuakane, 13 Haw. 499.

19. The rule in Shelley's case, "an ancient dogma of the common law," has been rejected.

Thurston v. Allen, 8 Haw. 392.

20. When a rule such as that relating to a conveyance by a disseisee to a third party is "not adapted to the conditions of equality, freedom of trade and fair administration of justice that have long prevailed here" it has been rejected by the Supreme Court of Hawaii.

Mossman v. Hawaiian Government, 10 Haw. 421, 435;

Henrique v. Paris, 10 Haw. 408.

It is true that some of these decisions were made before January 1, 1893, the date of the enactment of the present Section 1 of the Revised Laws (adopting, with qualifications, the common law of England as the law of Hawaii), at a time when by statute this court was at liberty to adopt only those principles of the common law which it deemed not inconsistent with our institutions or the principles of justice; and yet many others have been rendered since January 1, 1893, and are based upon the ground that the rejected doctrines are within the exceptions named in Section 1 because contrary to Hawaiian judicial precedents or to Hawaiian usage, and since the enactment of Section 1, it has been considered that the previous rejection of certain essential parts of a system justified the present rejection of other parts, and that the previous application (contrary to the common law) of a general principle to one question justified its subsequent application to another question. See, for example:

Henrique v. Paris, 10 Haw. 408;

Mossman v. Government, 10 Haw. 421;

Rooke v. Hospital, 12 Haw. 375;

Branca v. Makuakane, 13 Haw. 499.

After enacting into law in the broadest terms the principles of the devisability of all property, of the descendibility of all property, of the assignability of choses in action, of the taxability of all interests in property, and of the right of the government to

take *in invitum* all interests in property for state purposes,—after providing by written law for the termination of the old feudal tenures which were devoid of the characteristics of assignability, descendibility and devisability, and for the substitution of a modern system of individual ownership accompanied presumably by its features of salability at will, descendibility and devisability; after declaring judicially that the English feudal system has no place in Hawaii and after expressing judicial disapproval of its doctrine that litigation would be promoted too readily by permitting assignability at law of choses in action and by permitting disseisees to deed their interests to strangers; after judicially declaring that estates tail and conditional fees have no place here because they are inconsistent with the principles of our statutes of descent and wills and with other local conditions generally; and after declaring that champerty and maintenance are not contrary to our laws,—how can we consistently incorporate now as a part of the law of Hawaii that feature of the common law of England, if such it was, which declared that a remainder contingent upon the survivorship of the devisee at a stated time is a mere possibility and not a possibility coupled with an interest and, therefore, not assignable at law even though assignable in the eyes of a court of equity? The history of Hawaii's land tenures and all of its judicial declarations on the subject have proceeded upon the theory of the freedom of alienation of all property with perhaps certain exceptions,

immaterial in this case, relating to married women. We submit that to now incorporate an exception so glaringly unsound in reason against one class of contingent remainders while other classes of contingent remainders remain alienable at law as well as in equity, would be to progress backward and to run counter to all of Hawaii's judicial and other local history. The exceptions declared in Section 1 of the Revised Laws are just as real as the general rule itself of applicability of the common law. To now hold that contingent remainders and executory devises contingent upon the survivorship of the devisees are inalienable would be to disregard the exceptions plainly stated in R. L., Sec. 1. The exceptions referred to are in Section 1, R. L. 1915, stated to be that the common law of England shall not apply when "otherwise expressly provided by the constitution or laws of the United States or by the laws of the Territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage.

In *Ninia v. Wilder*, 12 Haw. 104, 117, 118, 119, it was held that "a deed from the owners of the contingent fee together with a release from the executory devisees will convey a good and sufficient title; and an agreement for the sale of land entered into between the owners of a contingent fee and the executory devisees with a second party will be specifically enforced against such second party. * * * Executory devises by the modern conception are capable of being devised by will, assigned or conveyed by deed, and of being transmitted by inheritance and

transmission to the devisees' or grantees' heirs or personal representatives." It is there recognized that "at common law the release could not have been made to a stranger under the rule of policy which prohibits the granting or assigning of remote or contingent rights to real estate in the same manner and for the same reason that the common law prohibited the assignment of choses in action," and that this was so "because such transfers were thought to promote litigation." Hawaii has always shown that she has not the same fears with reference to maintenance or the promotion of litigation in any such way. It was "to prevent maintenance and the multiplying of contentions and suits" that it became "an established maxim of the common law that no possible right, title or any other thing that was not in possession or vested in right could be granted or assigned to strangers." Referring to a case where the release by contingent remaindermen was to one of the parties in possession having title, the court said, "But it matters not here whether the release be to a party in possession or to a stranger, having seen that in *Mossman v. Hawaiian Government*, supra, the common law rule as to conveyances of one not in possession to one not in possession is not in force in this jurisdiction." In concluding the court held that the case was not upon debatable ground and that the deed offered by the contingent remaindermen conveyed a good and sufficient title. The contingency in that case was as to the survivorship of the devisees. See also *Brown v. Spreckels*,

18 Haw. 91, 95, 96, and the same case in 212 U. S. 208, 210.

13.

THE SONS' PRIVILEGE OR RIGHT TO PAY \$5000 AND TO CAUSE THE LANDS TO BEFALL ON THEM WAS NOT PURELY PERSONAL BUT WAS ASSIGNABLE.

There is no foundation in the will for any contention that the devise to the sons was purely personal. Whether it was or not depends entirely upon the language used by the testator. The view that it was is, it is submitted, utterly untenable. The language of the devise is entirely similar to that of an ordinary devise. Surely the testator did not mean that he was giving the lands to Frank, Henry and Christian without any power or right on their part to transfer that right, whether before or after it should become vested, to another. If he did mean that in this will then every testator means it when he says in substance, "I give my homestead to my daughter Frances," or "I give my cattle ranch to my son John." So also any claim that the right to make the payments of \$5000 each and thus to cause the devise of the lands to the sons to become operative was intended to be a purely personal privilege is utterly untenable. It is nothing more than an ordinary condition the substance of which is "I give you that land on condition, however, that you pay your sister five thousand dollars." What the testator in such

a case wishes is that his daughter shall have \$5000 and his son the land. Whether the \$5000 is taken out of other moneys then had by the son or is carved out of the land devised by way of a mortgage placed thereon by the son or is secured by the son by a sale of his interest is a matter of immateriality to the testator. Nowhere in the will is any indication given of any desire on the part of the testator to prohibit the alienation of the lands referred to in Article "Third" or of any interests or rights therein, whether by the sons or by the daughters. In Article "Second" the testator did express his desire (even though ineffectively) that the ten particular lots of land there mentioned should be inalienable to anyone outside of the Bertelmann family; but no such suggestion, directly or indirectly, is made with reference to the bulk of the lands owned by him and being those mentioned in Articles "Third" and "Fourth." Under the express words of Article "Fourth," the lands could be sold under certain circumstances and the proceeds in money given to the persons there named. Under Article "Fourth" the children did very clearly have the right to dispose of the land or its proceeds, each as he saw fit. If it had been intended to accomplish something out of the ordinary by Article "Third," the testator certainly would have used some language to express that intention; but he has not done so. If the provisions are read in their ordinary, every-day meaning no such restrictions or limitations can be construed out of them. It would have been very simple, indeed, for the tes-

tator to have added a statement to the effect that the right to pay the \$5000 was intended to be entirely personal to his sons and to be non-exercisable by anyone else and inalienable. By Article "Second" he has shown that he knew how to express the wish when he had such a wish. It is reasonable to suppose that he would have made some similar statement if he had meant some similar limitation in Article "Third." Nothing but conjecture can be called to the support of any theory relating to a purely personal privilege or option. To read such a provision into the will would not be construction. It would be making a will for the testator.

To find from the authorities or to say that a purely personal privilege is not assignable is not to make any progress in this case. The question still remains, Did the testator intend to make in Article "Third" the gift to the sons a purely personal one or to make it possible for them personally and no one else to pay the sums named? and that is to be determined solely as a matter of construction of the terms of the will.

The mere absence of the word "heirs," of course, does not cut down the estate given to the sons. The word is not necessary in Hawaii to the creation of a fee. *Branca v. Makuakane*, 13 Haw. 499. This would be true whether the remainder is to be regarded as a vested or a contingent one or as being by way of executory devise.

Certainly under the terms of the will the sons immediately upon the favorable happening of the con-

tingency and the payment of the sums named would be entitled to sell the whole of their vested interest. So also it is clear that even prior to the vesting of the estate they would, in so far as any restrictions to the contrary appear in the will, be entitled to mortgage their contingent interests in order to secure the funds with which to pay the \$5000 to each surviving daughter. They certainly could also enter into a contract to secure the \$5000 and to sell upon the happening of the contingency their interests in the land. Why should the line be drawn at an out and out sale before the happening of the contingency? That the law would permit them to do all of these things we have already argued above. That the testator said absolutely nothing to show an intention on his part to prohibit them from doing them is what we are now contending. If such a limitation was intended,—if the testator's desire was to make it possible for the sons and no one else to pay the sums named or to hold the land, where are the words that show this, directly or indirectly? We fail to find them and we submit that they are not there. The majority opinion below has not pointed them out. The whole policy of the law is in favor of freedom from restraints against alienation and courts cannot construe such restraints into a will unless the testator has used language showing that it was his intention to impose them.

Would it not be in aid of the devise to the sons to permit them freedom of action so that they could, if necessary, mortgage or even sell a part of their in-

terests in order to obtain the five thousand dollars for each surviving daughter and thus retain for themselves the remainder—perhaps the larger part—of the lands? There is nothing in the will to indicate directly or indirectly that the testator desired that the sons should not have this freedom.

14.

OPTION.

What has been said against the theory of a purely personal privilege applies as well against the theory of an option. The mere use of the statement that “the two or the one of my sons will have a right to *buy* the whole of my lands” does not suffice to establish the theory of an option. The testator did not intend thereby to convey the idea that the daughters and shortcoming sons, if any, would first own the lands and that thereafter the non-shortcoming sons would have to buy it from them upon the terms stated if they wished to acquire it. On the contrary, his own words are that it is his sincere wish and will that his lands “shall *befall* in equal shares and interest upon my three sons,” with the proviso that they make the payments stated. The lands were to *befall* upon the sons, not by way of sale or conveyance from the daughters, but very clearly by way of devise and gift from the father. It is submitted that the theory of an option is insupportable in the light of the language of the will as a whole. Even assuming, however, that an option is given, which we deny,

it is well-known law that an option to purchase land based upon a valuable consideration and irrevocable creates an interest in the land and is assignable even before acceptance and even though it does not by its terms run to the assigns of the party to whom it is given.

Kreutzer v. Lynch, 122 Wis. 474;

Calanchini v. Branstetter, 84 Cal. 249;

Robinson v. Perry, 21 Ga. 183;

House v. Jackson, 24 Ore. 89;

Kerr v. Day, 14 Pa. 112;

Napier v. Darlington, 70 Pa. 64;

Wilkins v. Hardaway, 48 So. (Ala.) 678.

If there is any option at all in the Bertelmann will, it is irrevocable. It was created by the testator by an instrument which after his death was irrevocable and would stand upon the same footing as to assignability as an option given for a stated time for a valuable consideration.

15.

CONCLUSION.

It is submitted that the ruling of this court should be (a) that Catherine Haunani Bertelmann, having died prior to the expiration of the lease, although after the death of the testator, was not one of the "surviving daughters" referred to in Article "Third" as entitled to receive payments of \$5000.00 each, that her children and heirs are not now entitled to any payment of \$5000.00 and have no interest whatever

in the property devised by Article "Third" and that as against her heirs, the present defendants in error, the plaintiff in error is, without being required to make any payment to them, the sole and undisputable owner in fee of all of the property devised by Article "Third"; or, if this court is of the opinion that under a correct construction of the will Catherine Haunani Bertelmann was one of the "surviving daughters" referred to in Article "Third" because she survived the testator and that her heirs are now the owners of an undivided one-ninth interest in the lands in question, (b) that the condition named in Article "Third" is not now impossible of performance, that Mary N. Lucas has the right to defeat all of the interest of the defendants in error and to become as against said defendants in error, the undisputable owner in fee simple absolute of all of said lands and of every interest therein, by paying or tendering \$5000 to said defendants in error within one year from the expiration of the 25 years' lease, and that the ownership of said defendants in error of said one-ninth interest is subject to be defeated by said Mary N. Lucas upon payment or tender by her of the sum of \$5000 within one year from the expiration of the said lease. Judgment should be ordered accordingly.

Respectfully submitted,

ANTONIO PERRY,

Attorney for Plaintiff in Error.

Dated, Honolulu, T. H.,

August 22, 1916.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and the
BISHOP TRUST COMPANY, LIMITED, a
Corporation, Guardian of the Estate of said
WALTER W. SCOTT, JANET M. SCOTT and
RUBENA F. SCOTT, Minors,

Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

SEP 28 1916

F. D. Monckton,
Clerk.

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

MARY N. LUCAS,

Defendant, Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and
the BISHOP TRUST COMPANY, LIM-
ITED, a Corporation, Guardian of the Estate
of Said Walter W. Scott, Janet M. Scott and
Rubena F. Scott, Minors,

Plaintiffs, Defendants in Error.

SUBMISSION OF CASE ON AGREED FACTS.
ON WRIT OF ERROR TO THE SUPREME
COURT OF HAWAII.

Brief on Behalf of Defendants in Error.

I.

STATEMENT OF THE CASE.

The defendants in error agree and adopt the state-
ment of the case made by the plaintiff in error except
in the following particulars:

1. All questions as to conformity with Hawaiian
statute (Sections 2381-2385, R. L. 1915), in making
the submission to the Territorial Supreme Court,
have been disposed of by the fact that the court be-
low, in construing the local statute, entertained
jurisdiction of the case and rendered judgment
therein.

2. The defendants in error do not admit that the plaintiff in error has acquired all of the right, title and interest of the sons, and of all the daughters, with the exception of Catherine, the mother of the defendants in error, herein (Plaintiff's Brief, pp. 3 and 4), but admit that the plaintiff in error claims to have acquired all such right, title and interest, excepting as aforesaid.

3. If the statement by the plaintiff in error of the contention of the defendants in error (Plaintiff's Brief, pp. 5, 6, and 7), is intended to describe the contention made by the defendants in error before the Supreme Court of Hawaii, it has no place in the record, nor have the contentions of the plaintiff in error urged before the court below. The decision and judgment of the court below is the thing appealed from. Nowhere in the Transcript of Record in this case before this Court is there included the briefs, arguments or contentions made by the parties before the court below. If the statement is intended to represent the contentions that will be made by the defendants in error before this Court, the defendants in error decline to accept the description thereof, or the allusion thereto, made by the plaintiff in error, and reserve the right to state the same for themselves in this, their brief and argument.

4. In regard to the statement made by the plaintiff in error (Plaintiff's Brief, pp. 7, 8, and 9), as to the majority opinion, and as to the minority opinion, of the decision appealed from, the defendants in error make the following statement: The majority

opinion of the court below held, against the contention made by the plaintiff in error that the words of survivorship relate to the expiration of the 25 year lease period, that such contention was disposed of by the decision of the Supreme Court of Hawaii in *Bertelmann vs. Kahilina*, 14 Haw. 378, construing the same will. The majority opinion held:

“The former decision, * * * (Kahilina case), which simplified and narrows the questions here to be decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privilege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remainder in the daughters depended upon a condition subsequent—the payment to each daughter of the sum of \$5,000 at the time and in the manner prescribed in the will.” (Tr., pp. 84 and 85.)

The majority opinion, appealed from, did not hold, as set forth in the brief of the plaintiff in error (Plaintiff's Brief, p. 8): “that the condition named in Article ‘Third’ required as one of the elements, the payment of \$5,000 to *Catherine personally in her lifetime*,” (the italics are those of the plaintiff in error). The decision was that, by reason of Catherine's death before the expiration of the 25 year lease period, the condition prescribed in Article “Third” of the will became impossible of performance both as to her and as to her children, defendants

in error herein, who inherited from her. (Tr., pp. 87, 88.) The opinion further held that there was no provision in the will whereby the estate, which was vested in Catherine under the decision in the Kahilina case, could “be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of \$5,000, a privilege granted to the sons, or one or more of them, by the testator.” (Tr. p. 86.)

II.

RE-STATEMENT OF ERRORS ASSIGNED.

(a) *Errors 1, 2, 3, 4, 5, 6, 7, 15, 16, 19 and 20* may be re-stated as follows:

The court below erred in holding and rendering judgment, or in holding and rendering judgment upon the theory and to the effect, that Catherine’s children inherited their mother’s interest and are now the absolute owners of a one-ninth interest of the lands referred to in Article “Third” of the will, freed from the condition of defeasance, indefeasible by any act of the plaintiff in error, or by one or more of the sons, and not defeasible, nor acquirable, by the plaintiff in error, or by one or more of the sons, upon the payment by her or them, or by one or more of the sons to the children, or their guardian, of the sum of \$5,000 within one year after the expiration of the 25 years’ lease referred to in the will, and in holding that said three children have now any right, title or interest in the lands, or right to the payment of \$5,000, and in holding that Mary N. Lucas has no right, claim, title or interest in said one-ninth interest held to belong to the three children, and in not

holding Mary N. Lucas is the "indisputable" owner of all the lands in question and of said one-ninth interest without payment to Catherine, or to her children, and in not holding that neither Catherine's children or their guardian have no right, title or interest in the lands in question, nor to the payment of \$5,000.

These errors, summarized, comprise a statement of the whole appeal from that section of the majority opinion appealed from which is not covered by the decision in the Kahilina case. These errors raise the point as to what does, or does not, constitute a performance of the condition described in Article "Third" of the will.

(b) *Errors 8, 13, 14, 16 and 26* may be re-stated as follows:

The court below erred in holding that the death of Catherine before the expiration of the 25 year lease period, who held a vested remainder in fee subject to defeasance by a condition subsequent, rendered the performance of the condition impossible of performance and left the vested remainder freed of the condition; in holding that the performance of the condition required payment to Catherine personally, and that a payment to Catherine's children would not be a performance; and in not holding that, irrespective of the death of Catherine, the condition was possible of performance.

These errors, summarized, raise the point of *impossibility of performance* of the *condition*, as set forth in the majority opinion appealed from.

(c) *Errors 9, 10, 11, and 17*, may be re-stated as follows:

That the court below erred in holding that under the will Catherine took a vested remainder in fee subject to defeasance upon the performance of a condition subsequent and in failing to hold that she took an interest contingent upon conditions precedent and in not disaffirming the former decision of this court in *Bertelmann vs. Kahilina*, 14 Haw. 378; and in holding that the will “shows a manifest intent,” on the part of the testator, “that his three sons and six daughters should share equally.”

These errors, summarized, contain the point that this court should follow the *minority and not the majority opinion* in the Kahilina case.

(d) *Errors 18, 27, 28, and 29* may be re-stated as follows:

That the court below erred in holding the right or privilege granted by the will in Article “Third” “seems personal”; that the court below erred in holding that the right or privilege given the sons by clause “Third” of the will was not assignable and could not be exercised by their assignee, Mary N. Lucas.

These errors raise the point of *personal option or privilege and assignability thereof*.

(e) *Errors 22, 23, 24, and 25* may be re-stated as follows:

That the court below erred in holding that the words of survivorship in the phrase “surviving daughters,” wherever it occurs in Article “Third” of the will, refer to the death of the testator, and not

to the expiration of the 25 year lease period; and in holding that Catherine was, and in not holding that she was not, a "surviving daughter," within the meaning of Article "Third."

These errors, summarized, raise the point of meaning of "*surviving daughters*."

(f) *Error 21* may be re-stated as follows:

That the court below erred in not holding that, even if Catherine's children now have her interest in the lands, Mary N. Lucas has a right to defeat that interest and acquire it for herself by payment to them or their guardian of the sum of \$5,000, and thus render her title in all the lands absolute as against said children.

This error expressed the *minority opinion* in the decision appealed from.

III.

CONDENSED STATEMENT OF THE ARGUMENT OF PLAINTIFF IN ERROR.

The contentions of the plaintiff in error, as set forth in her brief, may be grouped under five general headings, as follows:

III-A.

That the entire provisions of the will are now open for construction by this court on appeal; that the question of the *kind and nature of estate taken by Catherine* under the will is open for construction, by this court.

Under this heading the 1st, 2d, 3d, and 4th headings of the argument of the plaintiff in error may be grouped, that is:

- (1) "No unusual weight attaches to the majority opinion appealed from."
- (2) "The doctrine of *stare decisis* and that of *res judicata* inapplicable in favor of the Kahilina decision."
- (3) "The majority opinion in the Kahilina case was incorrect."
- (4) "Immaterial whether devise to daughters was of a vested or a contingent remainder or a conditional limitation."

This group appears, but it is not so admitted, to cover Errors 9, 10, 11, 12, and 17.

In other words, this section of the argument appears to be designed to attempt to show that Catherine did not take a vested interest under the will of her father in the lands referred to in clause "Three" of the will defeasible upon the performance of the condition therein named, as was held by the majority opinion in the Kahilina case, but that she took some other interest subject to such defeasance, as was held in the minority opinion in the Kahilina case.

III-B.

That Catherine's interest, whether vested or by way of a contingent remainder, or conditional limitation, was defeated by her death before the expiration of the 25 year lease period and that her children, the defendants in error herein, did not inherit any interest or estate in said lands from her.

Under this heading the 5th, 6th, 7th, and 8th headings of the argument of the plaintiff in error may be grouped, as follows:

- (5) “Words of survivorship—rules of construction—to what period referred.”
- (6) “Devise to individual—death before testator—lapse.”
- (7) “Devise to a class—death before testator—survivors take all.”
- (8) “Construction of will of Bertelmann—what contingencies stated in Article ‘Third’ are. ‘Surviving daughters’ means those surviving at the expiration of the 25 year lease.”

This group appears, but it is not so admitted, to cover Errors 22, 23, 24, and 25.

In other words, this section of the argument is designed to open again the question of *survivorship* with reference to the kind of estate given to Catherine and, by this means, seek the opportunity of applying rules of construction, where words of survivorship are used, to the divesting of Catherine’s estate, irrespective of the fact that the kind and nature of the estate given Catherine under the will has been twice passed upon by the Supreme Court of Hawaii.

III-C.

That the condition described in clause “Three” of the will, and held in the majority opinion appealed from to be a condition subsequent, was not rendered impossible of performance by the death of Catherine prior to the expiration of the 25 years’ lease.

This contention is set forth under heading 11 of the argument of the plaintiff in error, as follows:

- (11) “The so-called condition subsequent has not become impossible of performance. Even if Catherine’s children now own a one-ninth interest, the plaintiff in error is entitled to pay them \$5,000 and thus defeat their interest and herself become the ‘undisputable’ owner of all of the lands mentioned in Article ‘Third.’ ”

This appears, but it is not so admitted, to cover Errors 8, 13, 14, 16, 21, and 26.

This contention expresses the minority opinion of the decision appealed from—that is, that Catherine’s children have a present vested interest in fee which can be defeated by the payment of \$5,000 to them by the plaintiff in error, the assignee of the sons named in the will.

III-D.

That the privilege or option given by Article “Third” of the will to the sons is not personal and is assignable, and not as held by the decision appealed from, personal and nonassignable.

Under this heading the 12th, 12a, 12b, 12c, 13th, and 14th sub-headings of the argument of the plaintiff in error may be grouped, as follows:

- (12) “Assignability of sons’ interests.”
- (12-a) “Assignability of vested remainders.”
- (12-b) “Assignability of contingent remainders and executory devises.”
- (12-c) “The common-law rule, if any, in restraint of alienation is not law in Hawaii. Complete freedom of alienation is the rule and policy in Hawaii.”

(13) “The sons’ personal privilege or right to pay \$5,000 and to cause the lands to befall to them was not purely personal but assignable.”

(14) “Option.”

This group appears, but it is not so admitted, to cover Errors 18, 27, 28, and 29, and brings up the question of *assignability of sons’ interest*.

III-E.

That the argument advanced by the defendants in error, and that some of the cases cited in their brief in the lower court, are erroneous in the opinion of the plaintiff in error, in the one case, and inapplicable, or in favor, of the plaintiff in error, in the other.

Under this heading may be grouped the 9th and 10th headings of the brief of the plaintiff in error, as follows:

(9) “Comments on argument for defendants in error.”

(10) “Comments on cases cited for defendants in error in the court below, and probably to be cited in their brief in this court.”

The defendants in error are compelled to say in this regard that nowhere in the assignment of errors of the plaintiff in error, copious as those assignments are, is there a single error assigned which will support argument of this character. The briefs and argument of counsel, both sides, were crystallized by the decision of the Court below. The question before this Court on appeal is, was that decision right

or wrong, and, if wrong, which is not admitted, wherein is it wrong, not what either counsel said or did in their briefs and argument before the lower court. As far as the Court is concerned there is nothing in the Transcript of Record showing what counsel did or did not do in the way of brief or argument in the lower court. Hence, the defendants in error do not deem themselves compelled to answer the contentions made under headings 9 and 10 of the brief of the plaintiff in error other or further than as above stated, and they do no more with regard to the kind of argument or character of citations they intend to make before this Court than to set the same down in this, their brief.

IV.

REJOINDER OF DEFENDANTS IN ERROR TO ARGUMENTS OF PLAINTIFF IN ERROR.

A.

As above set forth, the first four headings of the brief of the plaintiff in error amount to an assertion that this Court shall, on this appeal, reopen the Kahilina case; that the majority decision of the Supreme Court of Hawaii in the Kahilina case is incorrect; that the decision is not *res judicata*; that what Catherine took under the will is again open for construction; and that no unusual weight attaches to the majority decision of the Supreme Court of Hawaii affirming the majority opinion in the Kahilina case. These four headings and arguments of the plaintiff in error will be treated separately below.

A. (1)

Weight to be given majority opinion appealed from. (Plaintiff's Brief, p. 16.)

Plaintiff in error, under this heading, confined her objection to the majority opinion of the decision appealed from, and does not here state any objection to the minority opinion of the decision appealed from.

The statement may be made at this stage of the argument that the plaintiff in error, at this and in other parts of her brief, indicated that she would be satisfied with the minority opinion of the decision appealed from, provided her other contentions fail. The defendants in error urge that the majority opinion of the decision appealed from should prevail, but, failing that, the minority opinion should prevail.

On July 29, 1902, more than fourteen years ago, the Supreme Court of Hawaii handed down its decision in the case of *Bertelmann vs. Kahilina*, 14 Haw. 378. In that case the will of Christian Henry Bertelmann, now before this Court, was up for construction by the Court. The question before the Supreme Court of Hawaii then was, the nature and quantity of interest taken by the beneficiaries under the will, the will appearing to set the beneficiaries out in three groups—that is, the sons and daughters as one group, the sons as another group, and the wife as another group, for the purpose of making different dispositions as to groups, but not as to classes as that term is sometimes used in wills. The decision of the court (there also was a minority opinion), did not go any further, at that time, than to determine the kind

and quantity of estate taken by each of these beneficiaries, in groups, in the property devised them by the will. In other words, having established the nature and quantity of the estate so taken or acquired, the Court did not construe the will further as to what would become of such interest under the contingencies and conditions mentioned and described in other provisions of the will. The minority as well as the majority opinion, in that case, used the same division into groups of beneficiaries, but differed with the majority opinion as to the nature and quantity of estate taken by each group. The majority in that case held as follows:

“The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of \$2000.00 a year, which will be a charge on the land.”

“The children have equal vested estates in fee, subject to the widow’s interest, defeasible as to the interest of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interest.”

Bertelmann vs. Kahilina, 14 Haw. 378.

To summarize:

- (1) The widow had a life estate in one-third of the land.

- (2) The children, each and individually, sons and daughters alike, had equal vested estates in fee in the land.
- (3) The sons, as a class, with survivorship provided for, had contingent executory devises as to the interest of the daughters and of the shortcoming sons.

In the case now pending before this Court on appeal, the Supreme Court of Hawaii again had the same will under consideration and took up the question, not determined in the decision in the Kahilina case, what, under certain other provisions and conditions of the will, became of the vested interest given to Catherine, she having died after the testator and before the expiration of the 25 year lease period, leaving children surviving her, her husband and mother having pre-deceased her. The Court, in both minority and majority opinions, the Court being of entirely different personnel than that in 1902, affirmed the majority decision in the Kahilina case—that is, that Catherine took a vested estate in fee in the lands described in the will of her father, subject to be divested upon the performance of certain conditions named in the will.

The majority opinion went further and held that, because of the death of Catherine before the expiration of the 25 year lease period, the conditions prescribed in Article “Third” of the will became impossible of performance, and that her children, they having inherited their mother’s interest, are now absolute owners in fee of an undivided one-ninth interest in the lands described in the will freed from the di-

vesting condition; that the privilege or option given the sons by Article "Third" of the will, being personal in character, could not be assigned to the plaintiff in error, and, hence she could not exercise that privilege or option against any of the beneficiaries named in the will, including Catherine and, after her, her children.

The minority opinion, after affirming the decision in the Kahilina case, as above stated, that Catherine had a vested interest in fee in said one-ninth of the lands subject to defeasance by the performance of the conditions expressed in Article "Third" of the will, holds that, as to the performance of the condition, the predominating intent of the testator, as gathered from the will, that his sons or some or one of them might acquire the interest of all the others after the expiration of the 25 year lease period, at a stated sum, to wit, \$5,000, should prevail and should not be defeated by a requirement of literal performance of a condition precedent; and that, hence, Catherine's one-ninth interest, which descended to her heirs, could be defeated, as to those heirs, by the payment to them of \$5,000; and holding further that the right or privilege given the sons by Article "Third" of the will was not a mere privilege which could not be assigned to and exercised by the vendee of the sons.

It will not be urged by the defendants in error that more weight should be given the majority opinion appealed from, based, as it was, on the majority opinion thirteen years previous in the Kahilina case on the same will, than this Court by its custom and

usage, and in its discretion, should see fit to place thereon. The defendants in error believe that they should do nothing more in this relation than to call this Court's attention to the majority opinion of the Supreme Court of Hawaii in the Kahilina case, the long lapse of time between that opinion and the majority opinion of the Supreme Court of Hawaii now appealed from, and the affirmation, in the opinion appealed from, in both majority and minority opinions, of the principles laid down in the Kahilina case, and urge that this Court should, under all circumstances, give some weight to the majority opinion appealed from, without urging or appearing to urge that unusual weight should or should not be given to such opinion.

These facts are presented to show this Court that the provisions of the Bertelmann will have been twice under careful consideration by the Territorial Supreme Court, and that being so, the majority opinion is entitled to some weight, the extent thereof being wholly within the province of this Court, and wholly without the province of either the defendants in error or the plaintiff in error.

It is conceded by the Supreme Court of the United States that the Federal Courts lean toward the construction placed on a local law by the Territorial Court, especially a construction adopted before annexation.

And it is well known that appellate courts, to which appeals lie from state courts, usually place some reliance or weight upon the findings of the lower court of last resort, of state or territory, as to

local customs, usages, and practices, in whatever relation they may occur, and upon such court's construction of local statute law. Again, the extent thereof is within the sole province of the appellate court. How much of that usage would apply to an appeal from an appellate court from a decision turning on the construction of a will, is not for the defendants in error to say; not even to say that unusual weight should not attach to such decision. The defendants in error urge nothing in this regard, leaving the same to the Court and relying upon the statement of facts above made, as to the construction that has twice been placed on the Bertelmann will by the Supreme Court of Hawaii, once as a court of last resort, once as a court from which an appeal lies to this Court.

A. (2)

Doctrine of stare decisis and of res judicata inapplicable in favor of Kahilina decision.

(Plaintiff's Brief, p. 17.)

The *Bertelmann* vs. *Kahilina* case was decided by the Supreme Court of the Territory in 1902, about three years before the amendment of Section 86 of the Organic Act of the Territory (Act of April 30, 1900, 31 Sts. at L. 141, c. 339; 2 Supp. R. S. 1141), which permitted appeals to be taken from the Supreme Court of the Territory of Hawaii but *only* to the Supreme Court of the United States (Act of March 3, 1905; 33 Sts. at L. c. 1465, s. 3, as amended by act of March 3, 1909; 35 Sts. at L. c. 269, s. 1). Before Section 86 of the Organic Act was so amended

in 1905, the relation between Federal and Territorial courts were in general similar to those between the Federal and State courts; cases could be taken to the Federal Supreme Court from the Territorial Supreme Court, as from a State Supreme Court, only by writ of error and *only when a federal question was involved*, and could not be taken, as from other Territories, either by appeal to the Federal Supreme Court or at all to the Federal Court of Appeals.

Equitable Life vs. Brown, 187 U. S. 309, 47 Law ed. 190.

In fact, it was not permitted to take a case by writ of error or by appeal from final judgments of the Territorial Supreme Court to the Circuit Court of the Ninth Circuit until the passage (13 years after the Kahilina decision) of the Act of January 28, 1915, which provides as follows:

“Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of \$5,000, may be taken and prosecuted in the circuit courts of appeals.” (Act of January 28, 1915, at 38 Stat. at L. 804, c. 22.)

The decision in the Kahilina case finally disposed of the question of the kind or quantity of interest in certain lands devised by the will taken by the sons and daughters as a group, by the sons as a group, and by the wife of the testator. Catherine, the mother

of the defendants in error, personally and individually, took a present vested estate in fee, defeasible upon the performance of the condition described in clause "Third" of the will. The Supreme Court of Hawaii did not decide in the Kahilina case what acts or happenings would constitute a proper performance of the condition. There was no reason for the court to do so at the time. The only question before the court at that time was the kind or quantity of interest taken by the various beneficiaries, under the will. The question concluded, on the other hand, in the decision appealed from, and which comes up to this Court, and the only question before this Court, is the extinguishment or non-extinguishment of Catherine's vested interest in fee established in her by the Kahilina decision.

It appears from the Transcript of Record (Tr., p. 3), not directly but by reference to the Kahilina case, that Catherine, her sister Beatrice, and her brother Christian, were not named as parties to the Kahilina case. Nowhere is that fact alleged in the submission, but under stipulation, no advantage will be taken of a technical omission, if this is such.

The plaintiff in error cannot, nor can Beatrice or Christian, avoid the conclusions to be drawn against them from their own acts, nor can the plaintiff in error now take advantage of a right, which she asserts was Christian's and Beatrice's—that is, their right not to be bound by the decision in the Kahilina case, because Christian and Beatrice were not, as it appears, joined as parties in the Kahilina case. That case established a law of property which re-

mained unquestioned until this submission was argued before the lower court. It was affirmed by the various transfers of land hereinafter set forth, and is the law of the case before this Court.

The plaintiff in error claims to have acquired Christian's interest by deed, dated September 12, 1907 (Plaintiff's Brief, p. 4), five years after the Kahilina decision, which deed was recorded in the Hawaiian Registry of Deeds, September 14, 1907 (Tr., p. 33); and the interest of Beatrice, by deed dated October 12, 1904 (Plaintiff's Brief, p. 4), two years after the Kahilina decision, which deed was likewise recorded October 12, 1904 (Tr., p. 67). The paper title by record would therefore show as follows: that Christian Henry Bertelmann died February 15, 1895, seised of the lands in question (Tr., p. 2); that he left a will, which was duly admitted to probate in 1895, in which he left said lands to his children and wife; that in 1902, seven years after said will was admitted to probate, a decision was handed down by the Supreme Court of Hawaii, that court being at that time a court of last resort, determining the nature and quantity of interest taken by each of the children and by the wife under the Bertelmann will in the lands in question; that no appeal was or could be taken therefrom; that, at various dates from 1903 to 1915, the plaintiff in error secured separate deeds, purporting to convey all their interests in the lands in question, from all sons and daughters named in the will, with the exception of Catherine, which deeds are of record, and the dates of which are all subsequent to the date of the decision

in the Kahilina case (Plaintiff's Brief, p. 4); that before plaintiff in error secured a deed from one of the children, Frank, an assignment of mortgage, theretofore given by Frank to one Magoon, was assigned for valuable consideration to the plaintiff in error, July 28, 1902, one day prior to the Kahilina decision (Tr., p. 37); that Frank also mortgaged said lands to one Kobayashi (Tr., p. 38), which mortgage was assigned to one Peterson, August 18, 1902 (Tr., p. 41)—that is, subsequent to the Kahilina decision, and on the same day Peterson assigned the same to plaintiff in error (Tr., p. 42); that Frank mortgaged the same lands to plaintiff in error, August 13, 1902—that is, subsequent to the Kahilina decision (Tr., p. 44); that Frank's said interest was attached by an alternative writ out of the Supreme Court of Hawaii on December 16, 1902, and, after sheriff sale, conveyed by sheriff's deed, dated February 7, 1903, to the plaintiff in error (Tr., p. 52).

The plaintiff in error, claiming as assignee of all of the interests of two brothers, who were parties to the Kahilina case, of one brother, who was not, of four sisters who were, and of one sister who was not, is estopped from denying the Kahilina case, is *res judicata* as to her. Nor can she claim any relief from the rule because Catherine was not a party, and on that ground reopen the full consideration of the Bertelmann will.

The Kahilina case was one on the construction of a will, not on the nature of the rights and liabilities of one litigant as against another. In other words, the decision was conclusive as to the interests of the

beneficiaries in the land devised not as to any questions of personal rights or liabilities among themselves. The minority opinion as well as the majority opinion in the *Kahilina* case holds that each of the children of the testator (sons and daughters alike), is entitled to an equal share of the lands devised, subject to the life estate of the widow in one-third thereof (*Bertelmann vs. Kahilina*, 14 Haw. 378, 384, 393). In other words, the interest in the land of one is held not different from the interest of another or others of the children. Necessarily the determination of the right of one, where the rights and interests of each of the others is identical, would determine the rights and interests of each of the others of the same group.

This decision, made fourteen years ago, like a decree in probate, fixed interests in lands. The decision was final and conclusive as to all of the beneficiaries of the same group under the will, sons and daughters alike, and there has not been, and cannot now be, any appeal therefrom. As affecting title to land it would be relied upon by a purchaser to the same degree that a deed of record, or decree in probate, could be relied upon. Whether or not anyone did, or did not, rely on a judgment of record of this character begs the question. Being a judgment of record affecting title to land, of which no one can claim not to have had notice, the *right* to rely thereon cannot be questioned. Plaintiff in error says (Plaintiff's Brief, p. 19), "There is no evidence whatever that anyone, either a party or not a party to that case, has ever acted or omitted to act in re-

liance upon that decision.” We cannot perceive how the question of applicability of the doctrine of *res judicata*, or *stare decisis*, for that matter, would be affected or elucidated thereby. Anyone had the right to rely on the majority opinion in that case and could, if so desired, have the temerity to rely on the majority opinion.

We submit that the majority decision in the Kahilina case is the law of the case in this court in so far as the nature and quantity of the interest given to the beneficiaries under Articles “Third” and “Fourth” of the will, are concerned, and that the only questions before the Supreme Court of Hawaii in this case were, and the only questions before this Court are, was the vested interest of Catherine, mother of the defendants in error (the only one or ones who are entitled to, but have not, and do not, by bringing this action based on her vested right, raise the question of inapplicability of the doctrine of *res judicata* in favor of the Kahilina decision), divested by her death before the expiration of the 25 year lease period; was the condition named in clause “Three” of the will rendered impossible of performance, and hence void, by the death of Catherine during the 25 year lease period; can Catherine’s vested interest, now held by inheritance by her children, be divested by the payment to her children, before November 1, 1916, of \$5,000; can the condition be properly and legally executed by the plaintiff in error under her claim of grantee all of the interests, rights and powers of the sons under Article “Third” of the will, or, in other words, was the privilege, option or

interest, or by whatever name it might be called, given the sons in Article "Third" of the will to pay each of the daughters, or surviving daughters, \$5,000 and thereby "enter into full possession" of all the lands of the testator, a personal privilege, option or interest, and, as such, nonassignable.

The decision of the Supreme Court of Hawaii in the Kahilina case, as affirmed by the majority opinion of the decision in this case, was the final decision of a court of last resort, determining property rights which should not be disturbed and is a law of property and *res judicata*.

26 A. & E. Ency. 181.

This contention on the part of the defendants in error is further supported by the decision of the Supreme Court of the United States in *John Ii Estate vs. Brown*, 235 U. S. 342, 35 Sup. Ct. Rep. 106, 59 Law ed. 259, wherein it was held:

"That a decision of the Supreme Court of the Hawaiian Islands construing a Hawaiian will, should not be declared invalid by the Federal courts on grounds mainly of local form and procedure and wholly of local control—especially where, after Hawaii had become a Territory of the United States, the Territorial Supreme Court held that the decision in question could not be collaterally attacked."

This case turned on the construction given by the Supreme Court of Hawaii before annexation of the will of John Ii, and as to the nature and quantity of the estate taken by Irene, daughter of the testa-

tor, as against her children under the provisions of the will—that is, whether Irene had a fee simple title or an estate for life only. The Supreme Court of Hawaii decided that Irene, after she bore a child, became the owner in fee simple of the estate, and it was this decision which was relied upon as an adjudication concluding the case before the Supreme Court of the United States.

In other words, the question of *res judicata* was specifically raised and decided and it was held that the Supreme Court of Hawaii, being then the court of last resort, by its decision concluded all of the rights between the parties and that that decision must be respected by the Supreme Court of the United States, especially since annexation that decision was affirmed by the Territorial Supreme Court in another decision by that court on the same will.

The Court says, in part:

“The chief objection that is urged to the conclusiveness of the decision is that after the opinion of the Supreme Court no further proceedings were taken in the case. This seems to be answered by the decision next mentioned, and by the analogy, if not by the letter, of the statute then in force as to cases stated; that the case, the submission, and the written decision, shall constitute the record.”

Id., 264.

The question was raised in that case that the children did not appear to have had separate counsel and were not served with the bill in equity, al-

though their names were inserted as parties, and hence the decision of the Territorial Supreme Court was not *res judicata* as to them, but the court held:

“It appears from the decision of the court that the counsel represented and pressed their interest against that of their mother, and it seems to us not permissible to declare the highest court, of what was then a foreign jurisdiction, did not know its own power, and was proceeding in a manner that the court in another country might pronounce wholly void.”

Id., 264.

The second proceeding brought before the Territorial Supreme Court was an attempt to have the previous decision of the Supreme Court declared void and the interest of Irene adjudged to be only a life estate. The bill was dismissed on demurrer, and the Supreme Court of Hawaii expressed the opinion that the previous decision precluded a collateral attack by the minors.

The Court then said:

“It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirement of the law, of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better, as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decision, has been stated and re-

stated, from *United States vs. Perchemann* 7 Pet. 51, 95, S. L. ed. 604, 620, to *Michigan Trust Co. vs. Ferry*, 228 U. S. 346, 354, 57 Law ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed.”

Id., 265.

A. (3)

Majority decision in Kahilina case. (Plaintiff's Brief, p. 23.)

This is stated by the plaintiff in error (Plaintiff's Brief, p. 23) to be incorrect. It is submitted that not only is this majority opinion correct, but that it is a matter which cannot now be enquired into for the reasons stated under the foregoing heading as to law of property and *res judicata*. Reference is hereby made to that case and its reasoning and conclusions (*Bertelmann vs. Kahilina*, 14 Haw. 378). Moreover both the majority and minority decisions rendered by the Supreme Court of Hawaii in this case affirm the principle laid down in the Kahilina case that the daughters took a present vested estate in fee simple defeasible in the manner provided for in the will. The plaintiff in error, who still insists (Plaintiff's Brief, p. 31) that the minority opinion in the Kahilina case was and is the right decision, attempts to make it appear that Chief Justice Robertson, who wrote the minority opinion in this

case, has, in the minority decision, abandoned the ruling made by the majority opinion in the Kahilina case, that the daughters took a present vested interest in fee. A careful reading, however, of the Chief Justice's dissenting opinion, not only shows that he has not abandoned that ruling in the Kahilina case but has re-affirmed it.

The plaintiff in error stated the view of the Chief Justice as follows:

“In the first place, even if viewed as vested, the estate devised to the daughters is, as pointed out by Chief Justice Robertson in his dissenting opinion in this case, a conditional limitation rather than estate upon conditions subsequent.” (Plaintiff's Brief, p. 23.)

What the Chief Justice said was:

“Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition, but a limitation. The condition precedent to be performed by the sons is that they should pay, etc.” (Tr., p. 90.)

And again:

“The general rule, which, it is conceded is well settled that a condition precedent must be literally performed, should not be enforced in case of a will when the intent of the testator would be thereby defeated.” (Tr., p. 92.)

The only difference between the majority and minority opinions in this case is as to matter left undisposed of in the Kahilina decision, and, as to that, the majority opinion holds it to be a condition subse-

quent, while the minority opinion holds it to be a condition precedent. As to matter disposed of in the Kahilina case both opinions agree that the daughters took a present vested interest in fee.

It is unnecessary to dwell further on this point, since the plaintiff in error, under the next heading of her argument (Plaintiff's Brief, pp. 31 and 32), abandons all distinctions as to kind or character of estates as immaterial.

A. (4)

Immaterial whether devise to daughters was of a vested or contingent remainder or a conditional limitation. (Plaintiff's Brief, p. 31.)

Upon this point the plaintiff in error says in her brief:

“Under the theory of the defendants in error and of the majority of the court below, the condition is a condition subsequent. Under our claim it is a condition precedent. Under Chief Justice Robertson's view it is, strictly speaking, neither precedent nor subsequent, but is simply an event or series of events which marks the termination of the estate devised to the daughters. But whether it is a condition subsequent or a condition precedent or a contingency or condition marking the termination of one estate and the beginning of another, it is all the time one and the same condition.” (Plaintiff's Brief, p. 32.)

The defendants in error agree to the foregoing as an expression of the various views, except as to

the views of the Chief Justice, which were, and are, that it was a condition precedent.

The plaintiff in error then proceeds to say :

“The only question is, what is that condition? What is it that the sons are required to do?”
(Plaintiff’s Brief, p. 33.)

The defendants in error submit that the foregoing, together with what the sons can now do, or their purported assignee, can now do, is precisely the whole matter in issue on this appeal. Was or was not the court below right in the construction it put on this condition and its performance or nonperformance?

The plaintiff in error contends that the construction of this condition, and the performance or non-performance thereof, involves a question of survivorship, and that there should be applied thereto the usual principles governing and construing the use of the word “survivors” in a will. (Plaintiff’s Brief, p. 34 et seq.)

The defendants in error contend, on the other hand, that Catherine having acquired a present vested estate in fee, as was held and finally disposed of in the Kahilina case, which was subject to be divested by the performance of a condition subsequent, as was held by the majority opinion in this case, or by a condition precedent, as was held by the minority opinion, and that the use, or meaning of, “daughters or surviving daughters,” has been finally disposed of, as to the kind of estate devised to Catherine, as well as their application to the performance of the condition, by the majority opinion in the Ka-

hilina case, and by the decision appealed from, and for the reasons therein stated.

B. (1)

Words of survivorship—rules of construction—to which period referred. (Plaintiff's Brief, p. 34.)

Devise to individual—death before testator—lapse. (Plaintiff's Brief, p. 44.)

Devise to a class—death before testator—survivors take all. (Plaintiff's Brief, p. 45.)

Construction of will of Bertelmann—what contingencies stated in Article "Third" are. "Surviving daughters" means those surviving at the expiration of the 25 year lease. (Plaintiff's Brief, p. 47.)

Under this heading and as a matter of rejoinder, the defendants in error group the next four headings of the argument of the plaintiff in error, as contained in her brief, to wit, headings 5, 6, 7 and 8 as covering the same subject. In this portion of her argument the plaintiff in error seeks to again reopen the question of survivorship with reference to the kind of estate given to Catherine and by this means the opportunity of applying the rules of construction, where words of survivorship are used, to the divesting of Catherine's estate, irrespective of whatever kind of an estate she may have acquired under the will as held in the various majority and minority opinions of the Supreme Court of Hawaii.

As above stated, the question of survivorship does not and cannot enter into the case at this stage

thereof. The Kahilina case settled that once and for all time. Under the Kahilina case the words of the will "pay to each one of my daughters or surviving daughters" (Tr., p. 22), have come to mean, in relation to the performance of the condition contained in Article "Third" of the will: (a), to each of my daughters, individually and severally, who survive the 25 year lease period, and who may not have died within the one year thereafter, and to the heirs of those, individually, who may have died before the expiration of the 25 year lease period or who may have died during the one year thereafter without being paid; or, (b), to each of my daughters, individually and severally, who survive the 25 year lease period and as to those who may have died before the expiration of the 25 year lease period, or within the one year thereafter without being paid, the performance of the condition has become impossible.

In other words, the numerous cases cited by the plaintiff in error under this heading (Plaintiff's Brief, p. 34 et seq.), relate to gifts given to surviving children, the words surviving being construed to designate persons or classes in whom an estate should go or vest. In this case an estate has already been held in the Kahilina case to vest in Catherine and the question now turns on the divesting, or nondivesting, of that estate.

No question of survivorship can be raised as to the *performance of the condition* prescribed in Article "Third" of the will. The estate given to Cath-

erine under the Kahilina decision is to her personally, not as a member of a class. This estate has been inherited by her children, the defendants in error herein.

The defendants in error attach hereto, marked Exhibit "A," and made a part of this, their brief, the decision in "*Bertelmann vs. Kahilina*," 14 Haw. 378, in support of the contentions herein made and of the correctness of the majority opinion in that case and of the incorrectness of the contentions made by plaintiff in error hereof in her brief herein, and the incorrectness of the minority decision in the Kahilina case.

C.

The so-called condition subsequent has not become impossible of performance. Even if Catherine's children now own a one-ninth interest, plaintiff in error is entitled to pay them \$5000 and thus defeat their interest and herself become the "undisputable" owner of all of the lands mentioned in Article "Third." (Plaintiff's Brief, p. 70 et seq.)

Under this heading the plaintiff in error, in her brief, again brings in the question of "survivorship" as bearing on the performance of the condition prescribed in Article "Third" of the will, which estate descended to her heirs, the defendants in error herein, but controverts the majority opinion in this case that by reason of the death of Catherine, before the expiration of the 25 year lease period, the condition became im-

possible of performance, and supports the minority opinion that, although a condition precedent is usually strictly enforced, the supposed predominant intent of the testator should be followed, and the condition could be performed by payment of \$5,000 to the heirs of Catherine, the defendants in error herein.

The argument of defendants in error as to "impossibility of performance" is contained below. Subject to that and the question of assignability of the option given the sons under clause "Third" of the will, defendants in error believe that the statement by the plaintiff in error is correct, that the interest of the defendant in error may be defeated by the payment to them of \$5,000 by the plaintiff in error. We contend, however, as will be seen below, that not only has the condition become impossible of performance, but that the plaintiff in error has not succeeded to the option of the sons, because of the nonassignability thereof.

Defendants in error, therefore, on this, and on all other points raised by this appeal, attach hereto, marked Exhibit "B," and made a part of this, their brief, the decision of the court below in this case, contending that the majority opinion therein is correct and conclusive and if not, then the minority opinion therein is correct and conclusive.

D.

Assignability of sons' interests. (Plaintiff's Brief, p. 82.)

Assignability of vested remainders. (Plaintiff's Brief, p. 83.)

Assignability of contingent remainders and executory devises. (Plaintiff's Brief, p. 84.)

The common-law rule, if any, in restraint of alienation is law in Hawaii. Complete freedom of alienation is the rule and policy in Hawaii. (Plaintiff's Brief, p. 101.)

The sons' privilege or right to pay \$5,000 and to cause the lands to befall on them was not purely personal but was assignable. (Plaintiff's Brief, p. 111.)

Option. (Plaintiff's Brief, p. 115.)

In the discussion of the foregoing headings of her brief, plaintiff in error still adheres to her construction and applicability of the words, "surviving daughters," stating again (Plaintiff's Brief, p. 83) that, "it is immaterial whether the estate given to the daughters is vested or contingent." We submit that it was vested and all that remains to be done is to apply the condition to the daughters as individuals and not as a class.

The defendants in error are inclined to the belief that the privilege or option is not assignable, not merely because of the nature thereof, but because giving it assignability would defeat the "predominating intent" of the testator.

V.

IMPOSSIBILITY OF PERFORMANCE OF CONDITION.

Defendants in error contend that the condition prescribed in Article "Third" is a condition subsequent, as was held in the majority opinion of the

decision appealed from, and for the reasons set forth in the majority opinion, which are hereby made a part of this brief; or, as an alternative, a condition precedent, as was held in the minority opinion of the decision appealed from, and for reasons set forth in the minority opinion, which are hereby made a part of this brief.

In either case, whether subsequent or precedent, the authorities are unquestionable that a literal compliance must be made therewith. That this is the general rule is conceded in the minority opinion of the decision appealed from. Such being the case, the performance of the condition prescribed in Article "Third" of the will has become impossible of performance through the death of Catherine, and cannot be performed as to Catherine's children, the defendants in error herein, as such performance would not constitute a literal compliance with the terms of the condition as prescribed in Article "Third" of the will. Literal compliance with the will required payment by one or more of the sons. Chief Justice Robertson, however, in the minority opinion of the decision appealed from, takes the ground that, while ordinarily a literal compliance must be made of a condition precedent to divest a vested estate, the rule should not be followed in this case on account of what he decides is the predominating intent of the testator, viz., that the lands in question should fall upon his sons then surviving after the expiration of the 25 year lease period.

VI.

PREDOMINATING INTENT OF TESTATOR.

Defendants in error contend that the intent of the testator as found in the majority opinion in the Kahilina case, viz.:

“He meant to give his land to all of his children equally, subject to the widow’s interest, and, as one method of division, after the expiration of the lease, to give the sons the option of obtaining the whole upon making proper payments in money to the others.” (*Kahilina vs. Bertelmann*, 14 Haw. 378, 384.)

was and is the true “predominating intent” of the testator, and that, if his sons were unable, or did not, or could not, exercise the option, it was not to be exercised by a stranger. This intent is clearly borne out by Article “Fourth” of the will which provides that in case none of his sons should exercise the privilege, the lands should be divided equally among all of the children absolutely and in fee simple, free from all condition. Following the same intent, it is urged, that if the sons did not, or could not, exercise the privilege as to any one daughter, that daughter, or her heirs, should have the land clear and free of all condition in the same manner as was provided in Article “Fourth” of the will. In other words, the testator did not intend that strangers should have the benefit of the privilege which he intended for his sons personally. The intent of the testator appears to be, and we so submit, that while he intended that all of the lands should befall

to his sons, under prescribed circumstances, that if such lands did not, or could not so befall, such lands should not go to a stranger under the option or privilege given to his sons personally.

The defendants in error contend that the privilege given to the sons was a purely personal privilege which, as to them, is not assignable, and which cannot be exercised by the plaintiff in error claiming as assignee of the sons.

Catherine, and her children, by inheritance under her, have been held to have a vested interest in fee simple in one-ninth of the lands in question. Irrespective of the present value of said one-ninth interest, and said one-ninth interest can be computed, on the basis of the rent at 6%, to be worth \$10,000 or more, the plaintiff in error urges that she, as purported assignee of the sons, and claiming the option or privilege of the sons, can now step in and divest the defendants in error and deprive them of their inheritance by a payment to them of \$5,000 for the land, valued on the basis above, of the worth of \$10,000. This could not have been the intent of the testator, particularly in view of the provision he made in Article "Fourth" of his will, that in case none of the sons could perform the condition, the lands should go to his sons and daughters, or the heirs of such who may have deceased before the time for the performance of the condition, in equal shares absolutely and in fee simple and free from all condition.

VII.

CONCLUSION.

It is submitted that the ruling of this Court should be:

(a) To affirm the majority opinion of the decision appealed from; or, (b), affirm the minority opinion of the decision appealed from, and that judgment should be entered accordingly.

Respectfully submitted,

E. A. MOTT-SMITH,

Attorney for Defendants in Error.

Dated, Honolulu, T. H., September 15, 1916.

Exhibit "A."

DECISION IN BERTELMANN vs. KAHILINA,
14 Haw. 378.

FRANK C. BERTELMANN and HENRY G.
BERTELMANN,
vs.

SUSAN BERTELMANN KAHILINA; HELEN SMITH, wife of WILLIAM SMITH and WILLIAM SMITH her Husband; ANGE-LINE MOSSMAN, Wife of HARRY MOSSMAN and HARRY MOSSMAN her Husband; MINNA HALL, Wife of WILBUR HALL and WILBUR HALL her Husband; HATTIE BANNISTER, Wife of ANDREW BANNISTER and ANDREW BANNISTER her Husband.

Original.

Submitted June 13, 1902. Decided July 29, 1902.

FREAR, C. J., GALBRAITH and PERRY, J. J.

A testator devised certain land, which was subject to a 25 year lease at a rental of \$6,000 a year, to his wife, three sons and six daughters, as follows: (1) To his wife a life estate of \$2,000 or, in case of a change in the lease, one-third the net income, and, in case of her death, said \$2,000 a year or one-third to be equally divided among all his children or surviving children, and to each of the children or surviving children, an equal share of the remaining \$4,000 or two thirds of the income; (2) * * * ; (3) At the expiration of the lease, to his sons or *then* surviving sons or son, the land, provided such sons or son should then pay \$5,000 to each of the daughters or surviving daughters, but, in case one or two of the sons should be unable to pay such amounts within a year from that time, the other son or sons to have the right to buy the whole by paying (a) to each daughter or surviving daughter \$5,000, (b) to the short-coming son or sons each \$5,000, and that by doing so the sons or son will enter into full possession, and their or his right and title be undisputable, provided they comply with the said conditions, and (c) to the wife, a life rent of \$2,000 a year, to be a charge on the estate;

(4) Should none of the sons be able to pay these amounts, then the land to be sold or leased again according to the best interests of the family, the proceeds to be equally divided among the children or their lawful heirs and assigns, after the distributive share of dower is given to the wife. The wife and all the children survived the testator. Held,

The widow took a life estate in one-third the land, subject to be divested upon the performance of the conditions prescribed in the third item, in which case she would thereafter have a fixed sum of \$2,000 a year, which would be a charge on the land.

The children took, subject to the widow's interest, equal estates until the expiration of the lease, with vested remainders in fee, the former merging in the latter so as to make present vested estates in fee, defeasible as to the interest of the daughters and shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent devises as to such interests.

OPINION OF THE COURT BY FREAR, C. J.

(PERRY, J., Dissenting.)

The question is one of the construction of a will. The material parts of the will and other facts are set forth in the dissenting opinion of Mr. Justice Perry.

There are three classes of devisees—the testator's wife, his sons, and all his children, comprising three

sons and six daughters. The question is, what interests have they under the will?

As to the wife, there seems to be little or no doubt. The first item of the will clearly gives her a life estate in one-third of the land in question. The fourth is in harmony with this. But upon the happening of certain contingencies set forth in the third item her estate may be divested, in which case she would thereafter have in place thereof a fixed yearly sum which would be a charge on the land, to be paid by the son or sons who would take the whole land under that item upon the happening of such contingencies.

As to the children, they have equal vested interests under the first item, subject to the widow's interest, until the expiration of the lease to the Kilauea Sugar Company. The main question is, what have they after that under the third and fourth items?

As to the sons, in so far as they take under the third item, they take, subject to the charge in favor of the widow, a fee—whether defeasible or indefeasible, vested or contingent, by way of remainder or executory devise, remains to be seen.

If the payments prescribed in that item are conditions precedent, they of course cannot have a vested interest under that item until they perform the conditions, and the vesting of their estates will necessarily be contingent upon such performance. In such case they would take by way of contingent executory devise, to vest and take effect in possession upon such performance and at the same time divest the daughters and shortcoming sons or their heirs

of any interests that they might otherwise have either under the fourth item of the will or by descent. Whether such other interest would be by devise or descent would depend upon whether the devise in the fourth item would vest at or before the expiration of the lease or on nonpayment by the sons within a year thereafter—that is, according to whether the children would take under the fourth item immediately by way of remainder subject to be divested or by way of executory devise a year after, holding meanwhile as heirs.

If those payments are conditions subsequent, the sons take under the third item by way of remainder, to take effect in possession immediately upon the expiration of the lease and to be subject to be divested, upon nonperformance of the conditions, in favor of the devisees under the fourth item. Such remainder would be contingent. For, although courts lean strongly in favor of early vesting, they must yield to the clearly expressed intention of the testator. In this case the devise, to take effect in possession at a future time, being to the sons “*or then surviving sons or son,*” it is impossible to say until that time arrives which sons, if any, will be entitled to take under that description, and, in order that a remainder may be vested, it is necessary not only that it be capable of taking effect in possession whenever the particular estate may determine, but that there be a person in being and ascertained who answers the description of the remainderman at some time during the continuance of the particular estate and not merely at its termination.

20 Am. & Eng. Enc. of Law, 838 et seq. and notes; 2 Underhill, § 865. Here the contingency is inherent in the description of the devisees. There is not even a direct devise to all the sons with a divesting clause or devise over in the event of the death of one or more during the prescribed period.

In any event, therefore, until the expiration of the lease, the sons would have, so far as the third item is concerned, only a contingent interest. And this perhaps would be as far as it would be necessary to go in this case if this item alone were concerned. But it will be necessary to decide what all the children take under the fourth item, and in doing so it will be necessary or at least convenient to say further whether the payments are conditions precedent or subsequent and therefore whether the sons would take under the third item by way of remainder or executory devise.

All the children take a fee, of course, under the fourth item, in so far as they take at all under that item. There is no conversion of the land into money, for the direction to sell is not imperative. Nor does the fact that there is only a direction to sell or lease and divide the proceeds at a future time, without any express devise, prevent there being a devise or even a present vested remainder. 2 Underhill, Wills, § 866.

Under this item the children must take either a vested or contingent remainder or a contingent executory devise. It could not be a contingent remainder; for to be a remainder at all, it would have to take effect in possession, if at all, immediately

upon the expiration of the lease, but the only contingency—nonpayment by the sons—that would make it a contingent remainder, if at all, might happen at any time within a year after the expiration of the lease.

The estate therefore must be either a vested remainder subject to be divested upon the performance of the condition by the sons or else a contingent executory devise to vest and take effect in possession, if at all, a year after the termination of the lease in case the sons fail to perform the condition within that year. Which is it?

With the exception of the argument based on the direction to sell or lease and divide at a future time, which, as we have seen, is by no means conclusive, the arguments all seem to favor the theory of a vested remainder as against a contingent executory devise.

In general there is strong presumption in favor of early vesting. There is a strong presumption in favor of a remainder as against intestacy as to a portion of the estate—in this case for the short period from the expiration of the lease to the performance of the conditions in case they are performed or the end of the year in case they are not performed. There is a strong presumption that a condition imposed merely for convenience is not intended to delay the vesting of an estate—that is, is not intended as a condition precedent to the vesting, even if it should be to the enjoyment. Here the children would take under the fourth item immediately but for the allowance of a year to the sons in

which to make the prescribed payments, and that time is allowed for the sons' convenience and not for the purpose of postponing all the children.

The will itself contains nothing to clearly rebut these presumptions but on the contrary supports the view that the children were intended to take immediately upon the expiration of the lease rather than a year later. All three of these items show an intention on the part of the testator to treat all the children equally as to quantity of interest. The first and fourth items express this intention as clearly as it can be expressed. The third item merely gives the sons a privilege of obtaining all the land, but only on condition that they compensate the others for what they would otherwise have in the land. It is little more than one method of division. Accordingly, it would seem that the intention was to leave the land to all, subject to the exercise of the option by the sons, rather than to leave it to the sons subject to go over to all in case the sons should not exercise their option. The third item strongly bears out this idea. It shows that the payments therein prescribed are conditions precedent, in which case the sons could not take by way of remainder at all under that item. They could take under that only by way of contingent executory devise. The form of the proviso and its annexation to the devise itself, instead of being inserted in a subsequent clause, favors this construction. Moreover, even after the expiration of the lease it may not be known for a year which, if any, of the surviving sons will be able or willing to make

the payments. The provision for the payments to the other, the shortcoming sons as well as the daughters, also favors this construction. This and the use of the word "buy" tend to show that the testator thought the daughters and shortcoming sons already had an interest to be in a certain sense bought out. The sons may buy "the whole," as if they would not otherwise then have the whole, or as if the others already had some. And it is only "by doing so," that "they my sons, or he my son, will enter into *full* possession of *all my* lands, and their or his right and title will be *undisputable*, provided they or he (my son or sons) comply and fulfill the above-mentioned conditions." A distinction is made as between the payments to the other children and those to the widow. The latter are merely charges on the land and may extend over a period of years, and no express words of condition are set forth in connection with them, while the former are intended to be single payments respectively to be made within a limited time and are put in the form of express conditions. The sons would then at most take, not a contingent remainder, but only a contingent executory devise under the third item.

Again, if there is any distinguishing feature in the results as between vested and contingent interests, it is that a vested interest passes from the designated devisee to his heirs or assigns, while a contingent interest does not. Now, this distinction between an interest that would pass by descent or devise or conveyance even before the estate might take effect in

possession and one that would not so pass, is apparently just what the testator had in mind, as to the estate of all the children under the fourth item, for he there directs the division to be made among all the “children or their heirs and assigns,” as if they could devise or convey their respective interests before the period of distribution or taking effect in possession or as if, in case they did not do so, their interests would pass to their heirs by descent in case of their death before such period. If such is the case, the children must have a vested estate.

The foregoing considerations favor the view that the sons would take a contingent executory devise as against a contingent remainder under the third item; that all the children would take a vested remainder under the fourth item as against a contingent remainder in the sons under the third item; that under both items all the children would take a vested remainder, subject to be divested as to the daughters and shortcoming sons in favor of the other sons upon their performance of the prescribed conditions as against the view that all the children on the one hand and the sons on the other hand take alternate contingent executory devises with a possible intermediate period of intestacy.

But since all the children have vested estate until the expiration of the lease as well as vested, though defeasible, remainders after that, the lesser estates are merged in the greater and all the children have present vested estates in fee defeasible as to the interests of some of them upon the other's performance of the conditions prescribed. And this would

seem to be the intention of the testator as shown in all three clauses of the will. He meant to give the land to all his children equally, subject to the widow's interest, and, as one method of division after the expiration of the lease, to give the sons the option of obtaining the whole upon making proper payments in money to the others.

The questions are therefore answered as follows:

The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of \$2,000 a year, which will be a charge on the land.

The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interests.

GEO. A. DAVIS and F. M. BROOKS, for
Plaintiffs.

ANDREWS & ANDRADE, for Defendants.

DISSENTING OPINION OF PERRY, J.

This is a submission, under the statute, upon an agreed statement of facts.

On December 12, 1891, one Christian Bertelmann, of Pilaa, Kauai, executed a will containing, among others, the following provisions: "First. In consideration of Agreement and Lease of all my lands (except 100 acres actually fenced off and two acres of taro land at Kahili), made by myself with the

Kilauea Sugar Company, Limited, for the term of 25 years, commencing November 1, 1890, and ending November 1, 1915, at the rate of \$6,000 per annum, payable quarterly in advance, I make the following Arrangements.

“I give, devise and bequeath said rents as follows:

“1st. To my lawful wife, Susan C. Bertelmann, a life rent of two thousand dollars (\$2,000) yearly, payable quarterly, being one-third of above mentioned rent of six thousand dollars (\$6,000) or in case of any possible change in the actual agreement with the Kilauea Sugar Company, an equivalent of one-third of all net receipts or income of lands now rented to Kilauea Sugar Company. In case of Susan Bertelmann's death the above mentioned income of \$2,000 a year, or equivalent of one-third as her distributive share of Dower would be equally divided amongst my children or surviving children.

“2nd. To each and every one of my children or surviving children an equal share of the four thousand dollars (\$4,000.00) or the remaining two-thirds of the total income, deriving from the rent of my lands to the Kilauea Sugar Company or equivalent thereof.

“Third. At the expiration of twenty-five year's lease to the Kilauea Sugar Company, it is my sincere wish and will that my land should befall in equal shares and interest upon my three sons:—Frank Charles, Henry Godfrey, and

Christian Sylvester Bertelmann, or then surviving son or sons, provided, however, that at such a time these my sons or son, shall pay to each one of my daughters or surviving daughters the sum of five thousand dollars (\$5,000.00). In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the five thousand dollars (\$5,000.00) per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:—

“1st. To each of my daughters or surviving daughters the amount aforesaid of five thousand dollars (\$5,000.00).

“2nd. To my short-coming son or sons, the same amount of five thousand dollars (\$5,000.00) each, being the same share as will be paid the daughters. By doing so, they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable, provided they or he (my son or sons), comply and fulfill the above mentioned conditions.

“3rd. To my wife, Susan Bertelmann, a life rent of two thousand (\$2,000.00) per annum, I make the payment of all these amounts above given a charge from all my estate.

“*Fourth.* Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to

circumstances and best advantage of my family. The money deriving from said sale or lease will be fully divided amongst my children or their lawful heirs and assigns after the distributive share of Dower will have been given to my wife, Susan Bertelmann according to law.”

By other clauses of the will, which clauses are not now in dispute nor material to be considered, the testator made specific disposition of the one hundred acres and the two acre tracts mentioned in the first clause. The testator died March 15, 1895, being at the time of his death seised of the lands referred to in the will.

Christian Bertelmann left surviving him his widow, three sons and six daughters. The plaintiffs are two of the sons, the defendants Helen Smith, Angeline Mossman, Minna Hall and Hattie Bannister are four daughters and the defendant Susan Bertelmann Kahilina is the widow, named in the will as Susan Bertelmann.

The claims of the parties are thus stated in the submission: “That Frank C. Bertelmann and Henry G. Bertelmann claim that they, the said Frank C. Bertelmann and Henry G. Bertelmann, own two undivided thirds in fee simple of the said estate under said will, and the said Susan Bertelmann Kahilina; Helen Smith, wife of William Smith and William Smith her husband; Angeline Mossman wife of Harry Mossman, and Harry Mossman, her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, claim

that the said Frank C. Bertelmann and Henry G. Bertelmann own no such interest in the said estate, but that they, the said Frank C. Bertelmann and Henry G. Bertelmann own, and are well entitled to, two undivided ninths of the said estate under the said last will and testament of Christian Bertelmann, deceased; that they, the said Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband; Hattie Bannister, wife of Andrew Bannister, and Andrew Bannister her husband, own and are well entitled to four undivided ninths in the lands and premises under the said last will and testament of Christian Bertelmann, deceased; that the said Susan Bertelmann Kahilina owns and is well entitled to her dower as set forth in the said last will and testament of the said Christian Bertelmann, deceased.”

The questions submitted are:

“1st. What right, title or interest, have the said Frank C. Bertelmann and Henry G. Bertelmann, by, through, or under the said last will and testament of Christian Bertelmann, deceased?

“2d. Further, what right, title or interest have the said Susan Bertelmann Kahilina, Helen Smith, wife of William Smith, and William Smith her husband; Angeline Mossman, wife of Harry Mossman, and Harry Mossman her husband; Minna Hall, wife of Wilbur Hall, and Wilbur Hall her husband, and Hattie Ban-

nister, wife of Andrew Bannister, and Andrew Bannister her husband, by, through, or under the said last will and testament of said Christian Bertelmann, deceased?"

On behalf of the plaintiffs the main contention is that the three sons of decedent "took a vested interest in the realty in fee subject to be divested as to any of them in the event of their death before the expiration of the lease or upon their failure to pay the legacies provided in the will" and that their interest was "a vested remainder expectant, subject to a condition, the violation of which would forfeit their estate."

I respectfully dissent from the construction given the will by the majority. It is doubtless an elementary rule of the construction of wills that no remainder will be construed to be contingent which may consistently with the intention of the testator be deemed vested, and that the law favors the earliest possible vesting of estate and favors a remainder as against an executory devise. Still, an interest must be construed to be contingent if it is clearly so expressed and if it is necessary to do so in order to carry out the intention of the testator. So also, under like circumstances, the other less favored constructions must be adopted.

A remainder is contingent "when it is so limited as to take effect to a person * * * not ascertained, or upon an event which may never happen." *Woodman vs. Woodman*, 89 Me. 128. In the case at bar, the remainder, if any, is in my opinion, contingent. The devise expressed in the third clause, to take

effect at the expiration of the 25 years lease to the Kilauea Sugar Co., is to the three sons, Frank, Henry and Christian, "or then surviving sons or son." In order to take, each taker must be alive at the time named. It is impossible to ascertain now which one or more of the sons will be alive at that time. There is an uncertainty as to whether any of the sons and as to what one, if any, will ever have the right to the enjoyment of the estate. See *Bailey vs. Hoppin*, 12 R. I. 560, 567. For this reason alone, the remainder cannot be a vested one.

The argument is advanced that the remainder must be held to be vested rather than contingent because no disposition of the land is otherwise made for the period prior to the expiration of the lease. This position, I think, cannot be upheld. By the first clause of the will, all of the rents of the land, for the period referred to, are disposed of for the benefit of the widow and children in stated proportions. This is the equivalent of a devise of the land itself for that time—an estate for years. See 3 Wash. Real Prop. 382; *Earl vs. Rowe*, 35 Me. 414, 419; *Reed vs. Reed*, 9 Mass. 372, 373; *Caldwell vs. Fulton*, 31 Pa. St. 475, 479.

Another reason for regarding the remainder, if any, as contingent and not as vested, is that the testator has named another condition precedent to the vesting of the estate. Whether that condition will be performed or not, is uncertain. The condition referred to is that the surviving son or sons pay to the surviving daughters and to any delinquent son the sum of \$5,000 each at the expiration of the

lease or within one year thereafter. That the provision in question was intended as a condition, is not disputed; but it is contended that the condition is subsequent. Whether a condition is precedent or subsequent is a question of construction to be determined in view of the language of each particular will. As usual, it is the intention of the testator which is to be sought. If from the language used it is clearly evident that the testator intended "that a devisee to whom property is given should perform some act prior to the vesting of the estate, and without the performance of which it will not vest, the condition is precedent. Until it is performed the devisee has no title." See 1 Underhill on Wills, section 483. In stating what the devise to the sons is, and in the same sentence, the testator in the case at bar says, "provided, however, that at such a time these my sons or son, shall pay to each one of my daughters," etc. Immediately following this is an alternative provision to be good in case one or two of the sons are unable to pay, and that is that the other two or one may have the whole property by paying to the delinquent son or sons as well as to the daughters the sums named. "By doing so," continues the testator, "they my sons, or he my son, will enter into full possession of all my lands, and their or his right and title will be undisputable," again adding, as if to emphasize the point, "*provided they or he (my son or sons) comply and fulfill the above mentioned conditions.*" The obvious meaning of this is that if the conditions are not complied with, the sons will not have any right or title to the lands

under this clause. Proceeding still further, the testator provides for the contingency of *none* of the sons being able to pay. In that event, he says, they are to be “sold at public auction or leased” and the proceeds divided among all the children after dower has been given the widow; in other words, in that event the lands, not yet vested in the sons, are not to go to them alone but to them and to certain other persons.

The intention of the testator seems to me to be clear. In view of the fact, however, that the sons are allowed one year after the expiration of the present lease to the Kilauea Sugar Company within which to pay the amounts stated, and that a period of time may elapse between the determination of the particular estate and the vesting of the interest of the sons, it may be that the testator’s intention cannot be carried out on the theory of a contingent remainder. If that is so, the limitation can, nevertheless, be supported as an executory devise. See 4 Kent Com., p. 246 et seq.; 1 Bouvier’s Dict. 733; 1 Underhill on Wills, sec. 874 et seq. In the interval, if any, between the determination of the particular estate and the taking effect of the limitation over, the fee will be in the testator’s heirs, in the absence of a residuary clause. See Kent Com., 270, 284.

The contention of the defendants seems to be, in effect, that a vested remainder is devised to the daughters, with power to sell to the sons only, and that this restriction upon the power of alienation is invalid. I think that to so construe the language of the will would do violence to the intention of the

testator. The mere use of the word "buy" in the first paragraph of the third clause, above quoted, cannot have the effect contended for. The word was there used evidently in the sense of "acquire title to." If the argument of defendants were good at all, that the power or right to "buy" from the daughters presupposes a devise of the fee to the daughters, then such devise would of necessity be regarded as having been to the "shortcoming sons" as well as to the daughters. Such a construction, to wit, that each of the daughters and each of the shortcoming sons has a vested remainder, subject though it be to being divested, finds no support in the language of the will. If any vested remainder whatever could be held to have been given, it would be to each of the nine children. The latter, however, was not, as it seems to me, intended by the testator. If it had been, then certainly after he had once caused such estates to be vested in each and all of his nine children, he would not have permitted a divesting of any of such interests in favor of some or all of the sons without providing some compensation therefor. Yet, what he said was that the surviving son or sons have the whole property, not by paying to the surviving daughters and shortcoming sons *and to the heirs of any deceased daughter and to those of any deceased son*, but by paying to the surviving daughters (meaning daughters surviving at the expiration of the lease and not at the death of the testator) and to the shortcoming sons only. This strongly supports the view that as between the three sons on the one hand and the nine children on the

other the devises were of alternate contingent remainders, or, at least, of alternate contingent executory devises. In other words—and the testator wrote the four clauses in their natural order—if the sons pay the surviving daughters and shortcoming sons, they shall have all the property; if they do not so pay, the nine children shall have it all. If the testator omitted to provide, in certain contingencies, for the heirs of deceased sons or daughters, the court cannot remedy the defect. As I understand the majority opinion, it is not therein decided whether or not the condition named in the third clause requires the payment by the surviving sons of \$5,000 to the heirs of any deceased son or daughter in order to defeat what is adjudged to be the vested interest of each son and daughter.

The use of the word “assigns” in the fourth clause is not sufficient, I think, to overcome the indications contained in the other parts of the will showing that the devise was intended to be of contingent interests; or is it inconsistent therewith. “Heirs” and “assigns” were named by the testator in that clause as persons to take by way of substitution for those dying or assigning, respectively, before that time. A conveyance of a contingent remainder, if for a valuable consideration, would be enforced at least in equity and would operate by way of estoppel to pass the interest or possibility of interest of the grantor to the assignee. There are authorities even to the effect that contingent remainders are alienable. See, for example, *Belcher vs. Burnett*, 126 Mass. 230, 231; *Drake vs. Brown*, 68 Pa. St. 223, 225.

The questions submitted should be answered as follows:

(1) The widow is entitled, (a) to a one-third interest in the land until the expiration of the lease to the Kilauea Sugar Company, (b) in case one or more of the sons pay as provided in clause 3, to a life rent of \$2,000 per annum secured by a charge upon the property, and (c) if none of the sons pay as provided by clause 3, to a life estate in one-third of the land.

(2) Until the expiration of the present lease to the Kilauea Sugar Company, each of the children of the testator is entitled to an equal share of the remaining two-thirds interest in the land.

(3) At the expiration of said lease, the son or sons at that time surviving, will, provided he or they pay \$5,000 to each of the daughters then surviving, and to each of the "shortcoming" sons, if any, take the fee of said lands, either as contingent remaindermen or by way of executory devise, subject to the charge in favor of the widow. In that event, the then surviving daughters and shortcoming sons, if any, will be entitled to the sum of \$5,000 each and no more.

(4) During the period, if any, intervening between the expiration of the present lease and the compliance by the son or sons with the condition as to payment, the heirs of the testator will be entitled to the land as provided by law, subject to the widow's right of dower.

(5) If none of the sons comply with the condition of clause 3, then, subject to the widow's life estate, all the land goes to the nine children.

Exhibit "B."**DECISION IN SCOTT MINORS vs. LUCAS.**

23 Haw. 338.

June, 1916.

Syllabus.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY LIMITED, a Corporation, Guardian of the Estate of Said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

vs.

MARY N. LUCAS.

No. 927.

**SUBMISSION UPON AGREED STATEMENT
OF FACTS.**

Argued April 13, 1916. Decided June 13, 1916.

**ROBERTSON, C. J., WATSON AND QUARLES,
JJ.**

Wills—Vested remainder—Defeasance—Condition impossible of performance.

Where by a last will and testament a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent and prior to the performance of the condition such condition becomes impossible of performance, the vested remainder absolute in the devisee and no longer subject to the defeasance provided for in the will.

OPINION OF THE JUSTICES BY QUARLES, J.
(ROBERTSON, C. J., dissenting.)

This is a controversy submitted upon agreed facts to obtain a decree quieting title to an undivided one-ninth interest in and to certain lands described in the submission of facts. The plaintiffs, Walter W. Scott, Janet M. Scott and Rubena F. Scott, minor children of Catherine Haunani Scott (nee Bertelmann), appear by their guardian as plaintiffs, and Mary N. Lucas, who claims the said undivided interest, appears as defendant. The settlement of this controversy depends upon the construction of certain provisions in the last will and testament of Christian Henry Bertelmann, upon which the merits of the controversy must be decided. This will has heretofore been before this court for construction and the provisions here involved construed (*Bertelmann vs. Kahilina*, 14 Haw. 378), where it was held that each of the six daughters of the testator, under the first and fourth items of the will, took vested remainders in fee subject to defeasance upon payment to each of them of the sum of \$5,000 by the three sons, or one or more of them, of the testator, as provided in the third item of the will. That item reads:

“At the expiration of the 25 years’ lease with the Kilauea Sugar Company it is my sincere wish and *will* that my lands shall befall in equal shares and interest upon my three sons *Frank Charles, Henry Godfrey* and *Christian Sylvester Bertelmann* or then surviving sons or son. Provided, however, that at such a time these my sons or son shall pay to each one of my daughters or

surviving daughters the sum of *five thousand dollars* (\$5,000.00). In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the \$5,000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

“1. To each of my daughters or surviving daughters the amount aforesaid of \$5,000.00.

“2. To my shortcoming son or sons the same amount of \$5,000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above-mentioned conditions.

“3. To my wife Susan Bertelmann a life rent of \$2,000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate.”

The defendant has purchased all of the interest of the three sons and of all of the daughters except the late mother of the plaintiffs, she having died September 10, 1915, leaving the plaintiffs as her surviving children. The lease mentioned in the will has expired, and the one year in which the sons, or one of more of them, may purchase or acquire the interest of their sisters under the third item of the will, herein-

above quoted, is now running. It is contended on behalf of the defendant that Mrs. Scott, mother of the plaintiffs, having died prior to the expiration of the lease, the plaintiffs have no interest in the lands in question, and that the provision as to payment of \$5,000 to each of the daughters does not apply to the interest which Mrs. Scott would have if she had survived the expiration of the lease; and, that the defendant takes the whole freed from the charge of said \$5,000. In furtherance of this contention it is earnestly insisted on the part of the defendant that the former decision to the effect that Mrs. Scott and the other daughters took vested remainders in fee is incorrect and that their interests, respectively, are, and were, contingent upon their survival of the expiration of the lease, and upon the failure of the sons, or one or more of them, to pay to the daughters the \$5,000 each. These contentions were, we think, correctly disposed of in the former decision of this Court, for the reasons therein stated. The mother of the plaintiffs took a vested remainder in fee, subject to be defeated by the payment to her by the sons, or one or more of them, of the sum of \$5,000 within one year after the expiration of the lease. We do not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years, and which has become an established rule of property so far as the rights here involved are concerned. The former decision, which simplifies and narrows the questions to be here decided, correctly holds that the acquisition of the interests of the daughters under the will by the sons, or one or more of them, was a mere privi-

lege which depended upon a condition precedent—the payment of the prescribed sums—while the defeasance of the vested remainder in the daughters depended upon a condition subsequent—the payment to each daughter of the sum of \$5,000 at the time and in the manner prescribed in the will. The difference between a condition precedent and a condition subsequent is well described in *Winthrop vs. McKim*, 51 How. Prac. 323, where the court at page 327 says:

“Conditions precedent are such as must happen or be performed before the estate can vest.

“Conditions subsequent are such as when they happen or are performed, or are not performed, as the case may be, divest, curtail or abridge an estate already vested.

“It is also a well-settled rule that, where an estate is to arise upon a condition precedent, if the condition becomes impossible no estate or interest grows thereupon.

“Upon the other hand, if the performance of a condition subsequent becomes impossible, the condition is void, and the estate vests as though no such condition had been imposed.”

These rules are supported by practically all authority, English and American, from the time of Sir William Blackstone to the present. Blackstone (Book 2, 154, 156) says:

“An estate on condition expressed in the grant itself, is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon perform-

ance or breach of such qualification or condition. These conditions are, therefore either *precedent* or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. * * * These express conditions, if they be *impossible* at the time of their creation, or afterward become impossible by the act of God or of the feoffer himself or if they be *contrary to law*, or *repugnant* to the nature of the estate, they are void." See 2 Jarman, Wills, 5th ed., pp. 10, 11.

It is well settled that a condition precedent to the vesting of an estate must be strictly construed and fully performed (*Nevius vs. Gourley*, 95 Ill. 206, 213; *Martin vs. Ballou*, 13 Barb. 119, 132; Kent's Com. (13 ed.) 135, and authorities cited in note c.).

It is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of \$5,000, a privilege granted to the sons, or one or more of them, by the testator. That condition becoming impossible by the act of God is as though it

was never made. The plaintiffs inherited from their mother the estate bequeathed to her by the will and vested in her as decided by the former decision of this Court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed (1 Jarman, Wills, 5th ed., 827; 2 Jarman, Wills, 5th ed., 11, 13; Roper on Legacies, 618, 766, 767, 783; *Ridway vs. Woodhouse*, 7 Beav. 437, 49; Eng. Reprint, 1134; *Ill. Land & Loan Co. vs. Bonner*, 75 Ill. 315, 327; *McFarland vs. M. McFarland*, 177 Ill. 208, 217.) Conditions subsequent are not favored in law (*Davis vs. Gray*, 16 Wall. 203, 230), and are “construed beneficially in order to save, if possible, the vested estate or interest; and if such condition prove illegal, or incapable of performance, whether as against good morals or as impossible under any circumstances, or is rendered impossible in a particular case and under existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect” (*Harrison vs. Harrison*, 31 S. E. 455, 458).

We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons, or either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of

the provisions of the said will, which descended to and vested in the plaintiffs.

The agreed statement of facts is silent as to whether either of the sons is prepared to and desires to purchase the interest of the plaintiffs in the lands in question. Neither of the sons of the testator is a party to this submission. The defendant claims, in the event that it is held that the vested remainder which the mother of plaintiffs took under the will was not defeated by her death prior to the expiration of the lease, the right to defeat the interests of the plaintiffs by payment to them of the sum of \$5,000, by virtue of her having purchased the interest of each of the testator's sons. This contention fails under the conclusion reached. If the death of Mrs. Scott, mother of the plaintiffs, prior to the expiration of the lease did not make the condition subsequent by which the remainder vested in her by the will could be defeated impossible of performance, as we hold it did, then it would be necessary to decide whether or not the privilege given the sons, or one or more of them, under the third paragraph of the will, to purchase the estate in remainder which vested in the daughters at the death of the testator, passed to the defendant by reason of the deeds from the sons to her. This would involve the consideration of the question as to whether the privilege given the sons, or one or more of them, of buying out the daughters was a mere personal privilege to be performed by the sons only. A study of the will shows clearly a manifest intent on the part of the testator

that his three sons and six daughters should share equally; that the sons, at the expiration of the lease, jointly should have the right of buying out the interests of the daughters if all of the sons were prepared to and desirous of so doing; but, if one or two of the sons should not be so prepared, and so desire, the son or sons so prepared and desirous should have that right. It was a mere privilege accorded to the sons, or one or more of them, if their desires and ability to purchase should permit, of acquiring all the leased lands. The privilege granted seems personal, and no intention can be found in the will that the daughters should be obliged to sell their respective interests in the lands in question at the stated price of \$5,000 to anyone other than the sons, or one or more of them. The condition upon which the remainder which vested in Mrs. Scott, mother of the plaintiffs, could be defeated having become impossible of performance by reason of her death, thus terminating the privilege granted the sons of buying her interest, and defeating the remainder which vested in her, it is unnecessary to determine whether or not that privilege could be exercised by an assignee of the sons.

A judgment may be prepared decreeing that the defendant has no right, title or interest in or to the undivided one-ninth interest in and to the lands described in the agreed statement of facts claimed by the plaintiffs as heirs of Catherine Haunani Scott, vested in said plaintiffs in fee, and adjudging the plaintiffs to be the absolute owners in fee of said un-

divided one-ninth interest in and to the said lands, and it is so ordered.

E. A. MOTT-SMITH, for Plaintiffs.

A. PERRY, for Defendants.

SCOTT vs. LUCAS, 23 Haw. 338.

ROBERTSON, C. J., dissenting.

DISSENTING OPINION OF ROBERTSON, C. J.

The material portions of the will of the late Mr. Bertelmann are set forth in the former opinion of this Court reported in 14 Haw. 378, 385, 386.

The clearly expressed intention of the testator was that the sons should have the right to acquire the whole of the leased land upon giving to the daughters what the testator evidently considered a fair equivalent for the interests devised to them. It was his will "that my lands shall befall in equal shares and interest upon my three sons"; that they "will have a right to buy the whole of my lands now leased to the K. S. Co."; and that "by doing so, they my sons or he my son will enter in full possession of all my lands, and their or his right and title will be undisputable," etc. Thus did the testator express a dominating intent. It being a lawful intent it is the duty of this Court to see that it is carried out. Strictly speaking, I think, the estate given each of the daughters was not an estate upon condition subsequent, but a limitation. The condition precedent to be performed by the sons is that they should pay "to each one of my daughters the sum of five thousand dollars." The third paragraph of the will, taken by itself, supports the view that the remain-

ders of the daughters after the expiration of the lease would be defeated by death during the term of the lease. Upon a strict literal interpretation of that paragraph it would have to be held that the sons could acquire title to the whole land by paying \$5,000 to each of such daughters as might be living when the time came for the sons to exercise the right given them, i. e., between the date of the expiration of the lease and one year thereafter. Such literal interpretation is not followed, however, because it is not in harmony with the general intent of the testator as shown by the will as a whole, as held by this Court in the former case, that the daughters were intended to have vested estates in fee. That is, estates which would descend to their respective heirs. But this departure from the language used in the third paragraph, which is required by the entire context, should not be carried to such an extent as to defeat the primary and clearly expressed intent of the testator that his sons should have the right to acquire the whole land by paying for the interests given to the daughters and their heirs. The contingency of the death of a daughter before the expiration of the lease was not provided for. Yet in order to effectuate the intent manifested by the testator it must be held that as to the estate of a deceased daughter which has passed to her heirs the sons should have the right to pay those heirs the sum which the will stated should have been paid to that daughter had she lived. The primary intent of the testator having been ascertained from the will as a

whole the language used in any particular paragraph must, if inconsistent with that intent, be made to bend to it. "In case of doubt a will should be construed in favor of a general or primary intention rather than a particular or secondary one; and where in such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator's general intention as ascertained from all the provisions of the will, the general intention must prevail."

40 Cyc. 1393. The general rule, which it is conceded is well settled, that a condition precedent must be literally performed, should not be enforced in the case of a will when the intent of the testator would thereby be defeated. The general and primary intent was that the sons, or one or more of them, should have the whole land; the language used with reference to the condition upon which they should acquire it was the expression of a secondary and particular intent. The means was secondary to the end, and should yield or conform to it. To hold otherwise, it seems to me, is to sacrifice the substance to the shadow upon a narrow and technical view. This is not a case where the literal performance of a condition has become impossible. The condition precedent prescribed in the third paragraph of the will could be literally performed, and, as the agreed facts show, has been performed, notwithstanding the death of one of the daughters, by making the payments to the surviving daughters. Properly construed, however, the condition precedent which the

testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment to the surviving daughters only, but that they should pay the sum named for the interest given to each of the daughters and their heirs. The right to acquire the interests of the daughters was not, I think, a mere personal privilege which could not be assigned to and exercised by a vendee of the sons. In my opinion the judgment should be that the plaintiffs are seised in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of \$5,000.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT,
a Minor, RUBENA F. SCOTT, a Minor, and the
BISHOP TRUST COMPANY, LIMITED, a
Corporation, Guardian of the Estate of said
WALTER W. SCOTT, JANET M. SCOTT and
RUBENA F. SCOTT, Minors,
Defendants in Error.

REPLY BRIEF
ON BEHALF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

Filed

OCT 2 - 1916

F. D. Monckton,
Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, Janet M. Scott, a
Minor, Rubena F. Scott, a Minor, and the
BISHOP TRUST COMPANY, LIMITED,
a Corporation, Guardian of the Estate of Said
Walter W. Scott, Janet M. Scott, and Rubena
F. Scott, Minors,

Defendants in Error.

SUBMISSION OF CASE ON AGREED FACTS.
ON WRIT OF ERROR TO THE SUPREME
COURT OF HAWAII.

Reply Brief on Behalf of Plaintiff in Error.

I.

WORDS OF SURVIVORSHIP—MEANING—
CATHERINE NOT A SURVIVING DAUGH-
TER.

Our contention that by the proviso in Article
“Third” of the Will relating to payment by the
sons to the daughters or “surviving daughters” the
testator meant daughters surviving at the expiration
of the 25-year lease and did not mean daughters sur-
viving at his own death, remains, upon its merits,
wholly unanswered in the brief of the defendants in
error. Not a word of argument is there advanced
against the soundness of the construction thus con-
tended for by us. Not because it remains unan-

swered on its merits, but because it is intrinsically sound it is respectfully submitted that the construction contended for by us should be adopted by this Court, and that it should be held that "surviving daughters" are those only who survived the expiration of the lease, and that Catherine was not a "surviving daughter."

II.

IN THE KAHILINA DECISION THE WORDS "SURVIVING DAUGHTERS" WERE NOT CONSTRUED; NO QUESTION OF SUPPOSED IMPOSSIBILITY OF PERFORMANCE WAS DETERMINED; WHAT WERE THE REQUIREMENTS OF THE PROVISOR OR CONDITION WAS NOT DECIDED.

The only answer attempted by the defendants in error to our contention referred to in paragraph I above is summarized in their words (pp. 32, 33, of their brief) that "the question of survivorship does not and cannot enter into the case at this stage thereof. The Kahilina case settled that once and for all time." In various forms throughout their brief this claim is repeated.

One sufficient reply to this point of defendants in error is that the Kahilina decision did not decide, or attempt or purport to decide directly or indirectly, what the term "surviving daughters" means, or whether, in other words, "surviving daughters" are, on the one hand, those who survived the testator or, on the other hand, those who survived the expiration of the lease. A careful examination of the ma-

jority opinion in that case (set forth at length in brief of defendants in error, pages 40 to 50) will show this assertion to be correct; and in the minority opinion (opposing brief, p. 60—14 Haw. 391) the dissenting justice said, at the very time when the matter was under discussion by the court (dissenting opinions are, in Hawaii at least, always examined by the majority before the opinion of the latter is signed and filed), “as I understand the majority opinion, it is not therein decided, whether or not the condition named in the third clause requires the payment by the surviving sons of \$5,000 to the heirs of any deceased son or daughter in order to defeat what is adjudged to be the vested interest of each son and daughter.” This latter statement was not disputed in the majority opinion. An examination of both opinions in the Kahilina case will show that the question of the meaning of the words of survivorship, i. e., the question whether the sons were required to pay \$5,000 to the heirs of a daughter who did not survive the expiration of the lease, was not before the Court for consideration. It was not in fact considered, either elaborately or scantily. Not a word of discussion on the subject is to be found in the Kahilina decision—not a word as to the existence or possibility of such a question or as to its effect upon the nature or extent of the title of the testator’s children or any of them. How, under these circumstances, can it be held or even urged that the Kahilina case decides the question of survivorship or of the terms of the so-called condition of defeasibility and that that question is not open

for examination in this case? There is absolutely no foundation for such a claim, it is respectfully submitted. .

The Kahilina case arose by submission on agreed facts. As stated in the submission, the claim of the sons Frank and Henry (brief of defendants in error, pp. 53 and 54) was that they then (1902) "owned two undivided thirds in fee simple of said estate under said will," and, inferentially, that the third son owned the other one-third, and the claim of the daughters was that each of the sons and daughters owned one-ninth in fee simple (subject to the widow's dower). No other claims were advanced by anyone. At that time (1902) all of the daughters had survived the testator and none of them had as yet failed to survive the expiration of the lease. There were as yet no heirs of any deceased daughter, for there was no deceased daughter; there was as yet no dispute, and no reason for dispute, as to whether a daughter who failed to survive the expiration of the lease would be a surviving daughter, or as to whether the heirs of such a nonsurviving daughter would be entitled to receive \$5,000 from the sons or as to whether the sons, under those circumstances, had the right to pay such heirs \$5,000 and thus defeat their interests, if any. Such an issue at that time (1902) would have been a fictitious issue, a moot question, and the Court, if it had been asked, would have refused to give it consideration.

The majority opinion in the Kahilina case did hold that each daughter had a vested estate, but it also held that that vested estate was defeasible by

the sons upon performance of the condition named in Art. III of the will, and it did not decide what the terms of that condition were. Its ruling was that “the children have equal vested estates in fee, subject to the widow’s interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of *the prescribed conditions* by the other son or sons, the sons having meanwhile contingent executory devises as to such interests” (concluding paragraph of opinion, 14 Haw. 384, 385; defendants’ brief, p. 50), and as expressed in the last paragraph of the syllabus prepared by the court itself (14 Haw. 379, defendants’ brief, p. 42), “the children took * * * present vested estates in fee, defeasible as to the interests of the daughters and shortcoming son or sons upon the performance of *the prescribed conditions* by the other son or sons, the sons meanwhile having contingent devises as to such interests.” But nowhere in that opinion did the court consider or determine what those “prescribed conditions” were. It was unnecessary to do so. The Court was not asked to do so and did not volunteer a decision upon a hypothetical state of facts (the failure of a daughter to survive expiration of the lease) which had not then arisen and might never arise. It is impossible to ascertain upon a study of the Kahilina decision what the view of the court was as to the meaning of the term “surviving daughters” or on the subject of alleged impossibility of performance.

Even if, therefore, this Court should, against our contention, take the view that the Kahilina decision

must be followed on the ground that it is binding or should be followed on the ground that it is correct, the decision so adopted would only be to the effect that the estate devised to the daughters was a vested estate, defeasible upon performance by the sons or one or more of them of “the prescribed condition,” and it would still remain for this Court to consider and determine what the prescribed condition was and whether there is any impossibility of performance.

III.

THE KAHILINA DECISION IS NOT *RES JUDICATA* IN THIS CASE; NOR DOES THE DOCTRINE OF *STARE DECISIS* OR THAT OF “THE LAW OF THE CASE” APPLY IN ITS FAVOR.

Our argument in support of this contention is to be found at pages 17–22 of our opening brief. By anticipation it answered many of the contentions of the defendants in error advanced in an effort to rest their present case purely upon that decision. A few words will be here added.

The decision of the Supreme Court of the United States in *John Ii Estate v. Brown*, 235 U. S. 342, 59 L. E. 259, cited by defendants in error at page 25 of their brief, is not an authority in support of the view that the Kahilina decision must be followed by this Court. As appears largely from the very quotations given in the brief (pages 25 to 28), and more fully from an examination of the report of the case itself, one of the points in *Ii v. Brown* was the construction of a will written in the Hawaiian language and con-

strued many years ago, by judges presumably more or less familiar with the Hawaiian language, in Hawaii where evidence and information as to the meaning of the words was readily obtainable. It is not to be wondered at that with the Hawaiian court's decision of such a point the appellate court hesitated to interfere. The other points related to Hawaiian statutes and to the procedure of the courts of Hawaii. One of them, for example, was whether a bill in equity for the construction of a will could go from a circuit court in Honolulu to the Supreme Court of Hawaii by the method of "reserved questions," and whether upon an appeal by that method the Supreme Court of Hawaii had or could obtain jurisdiction. Another was whether a final, formal judgment had been entered. Still another was whether a bill in equity had been sufficiently signed by or on behalf of certain minors. And the other questions likewise were purely of local procedure. As the Supreme Court of the United States itself said in concluding its decision "the grounds for the supposed invalidity" of the decision appealed from "are matters mainly of form and local procedure, and wholly of local control." Not of that nature are the questions in the case at bar. The question now before this Court is solely one of the construction of a will, written in the English language, with which the judges of this court are not less familiar than are the judges of Hawaii. No Hawaiian statutes are involved. No Hawaiian customs are involved. No procedure of Hawaiian courts is involved. No matters of form and no matters of local control are involved. The

only question which is involved is the clear-cut question of construction upon which this court is fully competent to pass. The Act of Congress of January 28, 1915 (38 Stat. at L. 804, c. 22), which gives us the right of appeal to this court, gives us the right to the independent judgment of this court upon the issue. The Act of Congress necessarily proceeds upon the assumption that the Supreme Court of Hawaii is human and may err in its decisions, and that it is wise and just that litigants, in the cases mentioned in the Act, should have an opportunity to obtain from the judges of this court consideration of cases appealed and a statement of their own views upon the issues involved.

Nor does the fact that the Kahilina decision was rendered in 1902, at a time when appeals were allowed from the Supreme Court of Hawaii to the Supreme Court of the United States, only when federal questions were involved, in any wise abridge our present right of appeal. The present case and the Kahilina case are separate and distinct causes. Unless the doctrine of *res judicata* or that of *stare decisis* applies—and we submit that neither does apply—we are, under the present law, entitled to a complete review of all the law questions involved.

References have been made by the defendants in error to the Kahilina decision, as “the law of the case.” If by that is meant anything different from the doctrine of *stare decisis* or that of *res judicata*, the contention is, it is submitted, unfounded. The doctrine of “the law of the case,” much controverted and of doubtful soundness as it is, has no place ex-

cept in the discussion of the effect of a decision rendered on a *prior appeal in the same cause*.

On the subject of the claim of *res judicata*, the defendants in error refer to the fact that it is not stipulated in the submission that Catherine, Beatrice and Christian were not parties in the Kahilina case. The fact, however, does appear clearly on the face of the decision in the Kahilina case, reported in 14 Haw. 378.

One reason why the Kahilina decision is not *res judicata* in the case at bar is that the daughter Beatrice and the son Christian, each a grantor of ours, were not parties to that case and were not bound by the judgment therein and therefore we are not bound. Another reason is that Catherine, the predecessor in interest of the defendants in error, was not a party and was not bound by that judgment. There was never any issue in that case between any of the sons or any of the daughters, on the one hand, and Catherine on the other hand, for Catherine was not a party. An estoppel by judgment to be good must be mutual. "The judgment or decree must conclude both parties or it will conclude neither. The estoppel must be mutual. No person can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise. A person who was not a party to an action cannot, by accepting the result of the judgment therein, make such judgment *res judicata* in his favor and preclude the parties to the action from objecting that the judgment was not binding upon him." 24 A. & E. Ency. Law, 730, 731.

23 Cyc. 1238, 1206, 1207.

1 Van Fleet, Former Adj., sec. 22, pp. 110, 111.
Bigelow, Estoppel (6th ed.), 127, 364, 553.

2 Black, Judgments (2 ed.), sec. 548.

1 Freeman, Judgments (4th ed.), sec. 159.

Litchfield v. Crane, 123 U. S. 549, 552 31 L.
Ed. 199, 202.

Lane v. Welds, 99 Fed. 286, 288.

Catherine was not bound and her heirs cannot rightly claim any estoppel against us. Had the Kahilina decision been in our favor, we could not have rightly claimed an estoppel against Catherine or her heirs.

The Kahilina case was not a proceeding *in rem*. It was an ordinary proceeding between adversary parties, the only difference between it and an action of ejectment or other action to quiet title being that in the Kahilina case the parties agreed upon the facts instead of litigating them. There was no attempt to make the whole world parties by service by publication or otherwise. Only the testator's children therein named as parties were parties.

IV.

NO ABANDONMENT BY PLAINTIFF IN ERROR OF CONTENTION THAT THE DEVISE TO THE DAUGHTERS WAS OF A CONTINGENT AND NOT OF A VESTED ESTATE.

Defendants in error in their brief (page 30) say that "the plaintiff in error, under the next heading of her argument (plaintiff's brief, pages 31-32) abandons all distinctions as to kind or character of

estates as immaterial.” No such abandonment was intended by us and none, it is submitted, can be inferred from our position in our opening brief. We did claim, and do claim, that in determining what the words of survivorship in Article III mean, it is immaterial whether the estate devised to the daughters was vested or contingent, because, as we contend, the meaning attached by the testator to the language used by him, in the proviso or condition in Article III, must have been one and the same, whether the court now regards the estate as vested or contingent and whether the court now regards the condition as subsequent or precedent. But we also claim and can, we submit, properly claim, that, if the question appears to the court to be material, the devise to the daughters was of a contingent remainder or executory devise, upon a condition precedent, and not of a vested remainder upon a condition subsequent.

V.

ASSIGNABILITY OF REMAINDERS, WHETHER VESTED OR CONTINGENT, AND OF EXECUTORY DEVISES BY WAY OF CONTINGENT REMAINDERS.

Not a word is said in the brief of our opponents by way of disputing the correctness of our contentions on this subject. It is submitted, both upon reason and upon authority, that the law contended for by us is too clear to admit of doubt.

VI.

THE SO-CALLED CONDITION SUBSEQUENT HAS NOT BECOME IMPOSSIBLE OF PERFORMANCE. EVEN IF CATHER-

INE'S CHILDREN NOW OWN A ONE-NINTH INTEREST, PLAINTIFF IN ERROR IS ENTITLED TO PAY THEM \$5,000 AND THUS DEFEAT THEIR INTEREST AND HERSELF BECOME THE "UNDISPUTABLE" OWNER OF ALL THE LANDS MENTIONED IN ARTICLE III.

It is said in the brief of the defendants in error (point VI, pp. 38, 39) that "the testator did not intend that strangers should have the benefit of the privilege which he intended for his sons personally," and that "the privilege given to the sons was a purely personal privilege which is not assignable." It is submitted, however, that an examination of those passages will show that they constitute nothing more than a mere statement of a conclusion contended for, and that nothing is there advanced by way of argument in support of that contention. We rest on this point upon our argument set forth in our opening brief.

It is worthy of note that while the bare contention is advanced on behalf of defendants in error, that the proviso or condition mentioned in Article Third is now impossible of performance by reason of Catherine's death prior to the expiration of the lease and that the sons' right to pay \$5,000 is not assignable, counsel doubtless deeming it his duty to his minor clients to call attention to every possible contention, the attorney for the defendants in error, without intending to abandon his contention, frankly discloses his own belief that the interest of the defendants in error is now defeasible by the plaintiff in error. His

own words (brief, p. 35) are: "The argument of defendants in error as to 'impossibility of performance' is contained below. Subject to that and the question of assignability of the option given the sons under clause 'Third' of the will, defendants in error believe that the statement by the plaintiff in error is correct, that the interest of the defendants in error may be defeated by the payment to them of \$5,000 by the plaintiff in error"; and it is further worthy of note that while contending that the majority opinion appealed from (which holds the condition or proviso to be impossible of performance) should be affirmed, also contends, in the alternative, that the opinion of the Chief Justice (which rules against the claim of impossibility of performance and holds the interest of the defendants in error to be defeasible), should be affirmed (brief, pp. 35 and 40).

VII.

CONCLUSION.

The arguments of the plaintiff in error upon the two main points involved, i. e., (a) that Catherine was not a surviving daughter and that her heirs have now no right, title or interest in the property and no right to any payment of \$5,000, and (b) that even if Catherine was a surviving daughter, the interest of her heirs is defeasible upon performance by the plaintiff in error of the condition as to payment remain, as to their merits, practically unanswered by the defendants in error. Their sole defense consists in reliance upon the Kahilina decision, which latter in the first place is not binding either upon us or

upon this Court and in the second place did not decide these two main points or either of them.

It is submitted that the ruling of this court should be as prayed for on pages 116 and 117 of the opening brief of the plaintiff in error.

Dated San Francisco, California, September 30, 1916.

Respectfully submitted,

ANTONIO PERRY,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LUI HIP CHIN,

Appellant,

vs.

LORENZO T. PLUMMER, Chinese Immigrant Inspector
in Charge at Helena, Montana,

Appellee.

In the Matter of the Applidation of LUI HIP CHIN,
an alien, for a Writ of Habeas Corpus.

Transcript of the Record

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

Filed

AUG 10 1916

F. D. Monckton,
Clerk.

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit.

*In the matter of application of Lui Hip Chin, an
alien, for Writ of Habeas Corpus,
Appellant.*

Transcript of the Record

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

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Names and Addresses of Attorneys of Record.

P. E. CAVANEY, Boise, Idaho,

For Appellant.

J. L. McCLEAR, U. S. District Attorney, Boise,
Idaho,

For the Department of Labor.

*In the District Court of the United States, District
of Idaho, Southern Division.*

PETITION.

In the matter of application of Lui Hip Chin, an
alien, for a Writ of Habeas Corpus—No. 564.

*To the Honorable Frank S. Dietrich, Judge of the
District Court of the United States for the Dis-
trict of Idaho:*

The petition of Lui Hip Chin, an alien respectfully shows:

First: That he is unlawfully imprisoned, detained, confined and restrained of his liberty by Lorenzo T. Plummer, a duly appointed, qualified and acting United States Immigration Inspector, and Thomas B. Martin, the duly appointed, qualified and acting United States Marshal for the District of Idaho, at Boise, Ada County. State of Idaho.

Second: That said imprisonment, detention, confinement, and restraint are illegal; and the illegality thereof consists in this, to-wit: That your petitioner now is and ever since the 13th day of September, 1915, has been a bona fide resident of the United States and a subject of the Chinese Empire, and a person belonging to a class of aliens which are not exempt from entering the United States, to-wit: a Chinese merchant, and being at all of the times herein mentioned entitled to all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.

Third: That on the 13th day of September, 1915, your petitioner was by the United States Immigration Officers and Inspectors in Charge, and the officers and agents of the United States Immigration Service and the Department of Labor, duly and regularly permitted to enter, and did then and there enter the United States at the port of San Francisco, California, on the steamship "Siberia" as a Chinese merchant.

Fourth: That your petitioner is not committed, confined or detained by virtue of a final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon any such judgment or order; that the cause and pretense of such confinement or restraint, according to the best knowledge and belief of your petitioner, is wholly without any right or authority whatever, but is based upon a certain warrant of arrest issued by the Department of Labor of the United States, a copy of said warrant being attached hereto, hereby referred to, and made a part hereof and marked Exhibit "A."

Fifth: That by virtue of and pursuant to said warrant your petitioner was on the 15th day of January, 1916, by Lorenzo T. Plummer, Inspector in Charge at Helena, Montana, by and through Thomas Topping, a Chinese and Immigration Inspector, acting under the advice and direction of the said Lorenzo T. Plummer, and Thomas B. Martin, United States Marshal for the District of Idaho, arrested and taken into custody and confined in the County

Jail of Ada County, at Boise, Idaho, and subsequent, to-wit, on the 19th day of January, 1916, at Boise, Ada County, Idaho, was given a summary hearing before the said Thomas Topping and was on the 21st day of March, 1916, ordered deported from the United States to the country whence he came by the Assistant Secretary of Labor. A copy of said order of deportation and notification are attached hereto, hereby referred to and made a part hereof and marked Exhibits "B" and "C" respectively.

Your petitioner further relates and shows:

A. That said warrant of arrest was issued against your said petitioner without authority of law.

B. That said Department of Labor of the United States has no authority whatever or at all to issue the said warrant or to hear said case.

C. That your said petitioner asserts and claims that he has a right to remain in the United States after his admission as a Chinese merchant even though your said petitioner has since his said admission performed manual labor.

D. That the said summary hearing which your petitioner had before the said Chinese and Immigration Inspector was not conducted according to law and the rules and regulations of the Department of Labor of the United States, and said hearing was unfair and unjust to your petitioner and did not afford to your petitioner the rights and privileges guaranteed to him by the Constitution and the laws of the United States and the treaty of the Chin-

ese Empire with the United States, and your petitioner was denied the right to have process issued from a court or tribunal of competent jurisdiction compelling the attendance of witnesses on his behalf at said hearing, or to pay the necessary expense or fees of such witnesses, and is and has been thereby summarily and arbitrarily deprived of his liberty, and said Chinese and Immigration Inspector has grossly abused the discretion imposed upon him by law and the rules and regulations of the Department of Labor of the United States in said hearing in not permitting your said petitioner an opportunity to have a fair and impartial trial in said matter.

E. That said evidence adduced at said hearing of said cause was wholly inadmissible and incompetent to prove that your petitioner had become a laborer since his arrival and admission into the United States.

F. That said evidence taken at said hearing failed to justify the said order of deportation of your said petitioner.

Wherefore your petitioner prays that a writ of Habeas Corpus may be granted directed to the said Lorenzo T. Plummer and to Thomas B. Martin commanding them to have the body of your petitioner before your Honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor concerning your petitioner, together with the time and cause of his detention, and said writ, and that he may be restored to his liberty.

Dated on this 6th day of April, 1916, at Boise,
Ada County, Idaho.

P. E. CAVANEY,
Attorney for your petitioner.

Residence: Boise, Idaho.

Filed: April 6, 1916. W. D. McReynolds, Clerk.
(Duly Verified.)

(Title of Court and Cause—No. 564.)

ORDER.

On reading and filing the petition of Lui Hip Chin, duly signed and verified by him, whereby it appears that he is illegally imprisoned and restrained of his liberty by Lorenzo T. Plummer and Thomas B. Martin, in the city of Boise, County of Ada, State of Idaho, and stating wherein the illegality consists, from which it appears to me that a writ of habeas corpus ought to issue:

It is ordered that a writ of habeas corpus issue out of and under the seal of the District Court of the United States, District of Idaho, Southern Division, directed to the said Lorenzo T. Plummer and Thomas B. Martin, commanding them to have the body of the said Lui Hip Chin before me, in the court room of the said court, on the 12th day of April, 1916, at 10 o'clock a.m. of that day, to do and receive what shall then and there be considered concerning the said Lui Hip Chin, together with the time and cause of his detention, and that they have then and there the said writ.

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Dated on the 7th day of April, 1916.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed April 7th, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

DEMURRER.

Now comes J. L. McClear, United States Attorney for the District of Idaho, and demurs to the petition for writ of habeas corpus in the above entitled application and for cause of demurrer alleges:

I.

That the petition herein filed does not state facts sufficient on which to grant a habeas corpus.

J. L. McCLEAR,

United States Attorney for the District of Idaho.

Endorsed: Filed April 15, 1916. W. D. McReynolds, Clerk.

At a stated term of the United States District Court within and for the District of Idaho, Southern Division, begun and held at Boise, within said division on the 27th day of April, 1916.

Present: The Honorable Frank S. Dietrich, Judge.

Among the proceedings had were the following, to-wit:

In the matter of the application of Lui Hip Chin, an alien, for Writ of Habeas Corpus.

The demurrer to the petition of Lui Hip Chin, an

alien, for a writ of habeas corpus came regularly on for hearing before the Court. The applicant, Lui Hip Chin, being present with his counsel, P. E. Cavaney, Esq., together with J. L. McClear, United States District Attorney. After the argument of counsel the matter was submitted to the Court upon briefs and was by the Court taken under advisement.

(Title of Court and Cause—No. 564.)

STATEMENT OF EVIDENCE.

Lui Hip Chin, Alien, arrested pursuant to Departmental Warrant of Arrest No. 53947-13 dated December 21, 1915. The hearing was had on January 19, 1916, at Boise, Idaho. Present, Thomas Topping, Examining Officer; Lui Hip Chin, Alien; P. E. Cavaney, Counsel for Alien; and Interpreter Lin S. Lee.

Alien sworn by Inspector Topping.

Examination by Inspector Topping:

Lui Hip Chin: I waive reading of warrant.

Statement by Inspector Topping: You are to be given a hearing to show cause why you should not be deported in conformity with law. You have the right to be represented by counsel.

Alien: Mr. P. E. Cavaney is my attorney. I am unable to furnish \$1000.00 bond at this time. I am confined in the County Jail at Boise, Idaho. I have examined the evidence upon which I was arrested. I made a statement to you at Mountain Home on December 4, 1915.

14 *Matter of Application of Lui Hip Chin*

Inspector Topping: (Exhibiting statement to alien). Question: Is this your signature?

Alien: Yes. This statement has been read over to me by the Interpreter. (Statement introduced in evidence and marked "Govt. Exhibit A.")

(GOVT. EXHIBIT A.)

Thomas Topping, Inspector.

Mountain Home, Idaho, December 4th, 1915.
Case of Lui Hip Chin, Section Six Merchant.

Loui Mon, sworn as interpreter.

Lui Hip Chin, sworn, testified as follows:

Q. What is your name?

A. Lui Hip Chin.

Q. How old are you according to Chinese reckoning?

A. 28 years.

Q. When did you first come to the United States?

A. Sept. 30th, 1915. Landed in San Francisco.

Q. How long did you stay in San Francisco?

A. About two months.

Q. How long have you been in Mountain Home?

A. I come to Mountain Home two months ago, I stayed three weeks in San Francisco.

Q. Isn't it a fact that you came direct to Mountain Home from San Francisco?

A. Yes.

Q. What have you been doing since you have been in Mountain Home?

A. Nothing.

Q. I found him washing dishes this morning in the New York Cafe.

A. He just help.

(Note: The hands of Lui Hip Chin show very distinctly that he has been washing dishes for some time.)

Q. Is this your certificate of identity?

A. Yes.

Certificate of identity No. 20794, issued to Lui Hip Chin, age 26 years, height 4—6 $\frac{3}{4}$ on cut (should be 5 ft. 6 $\frac{3}{4}$), occupation merchant; Stockton, California. Admitted as Sec. 6, Canton Merchant. Scar front of right ear. Issued at the Port of San Francisco, California, September 30th, 1915.

Q. Your brother lives in Mountain Home, does he not?

A. Yes.

Q. Give me his name.

A. Lui Mon.

Q. He is a tailor and cleaner?

A. Yes.

Q. How long has he been in Mountain Home?

A. Seven years.

Q. Have you understood all the questions put to you by the interpreter?

A. Yes.

Q. Give me your address.

A. Bon Restaurant, Mountain Home, Idaho.

(Signed in Chinese.)

(Signed) Thomas Topping,

Chinese and Immigrant Inspector.

Mr. Cavaney: Counsel for alien was not present when this statement was made at Mountain Home.

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Certificate of Identity No. 20794 introduced in evidence and marked "Govt. Exhibit B."

(GOVT. EXHIBIT B.)
CERTIFICATE OF IDENTITY.
Card No. 20794.

Name: Lui Hip Chin.

Age: 26.

Height: 4 ft., 6¾ in.

Occupation: Merchant, Stockton, Calif.

Admitted as: Sec. 6, Canton Merchant No. 14662—
4-8, SS "Siberia" September 13th, 1915.

Physical marks and peculiarities: Scar front of
right ear.

Issued at the Port of: San Francisco, Calif., Sep-
tember 20th, 1915.

SAMUEL W. BACKUS,
Immigration Official in Charge.

Ex parte statement of Louie Mon dated December
4, 1915, taken at Mountain Home, Idaho, introduced
in evidence and marked "Govt. Exhibit C."

(GOVT. EXHIBIT C.)

Mountain Home, Idaho, December 4th, 1915.
Case of Lui Hip Chin, Section Six, Merchant.

Witness, Louie Mon sworn.

Q. Do you understand and speak English?

A. Yes, fairly well.

Q. What are your names?

A. Just Louie Mon is my boyhood name; I have
no married name, no other. I catch my wife in Moun-
tain Home.

Q. How old are you.

A. 57 years.

Q. When did you first come to the United States?

A. I forget. K. S. 7th or 8.

Q. Have you made any trip to China.

A. Yes, once.

Q. When did you make that trip?

A. I forget.

Q. Have you got a certificate of residence?

A. No, it was burned in a laundry in Glenns Ferry, 13 years ago.

Q. How long have you been in Mountain Home?

A. Eight years.

Q. What was the number of your certificate?

A. I forget.

Q. Who was your witness?

A. I forget.

Q. Where did you get your certificate?

A. Portland, Oregon. Louie Nom is the name on my certificate.

Q. How old were you then?

A. 35 years old.

Q. Was there a photograph on your certificate?

A. Yes.

Q. Was it taken with your hat on or off?

A. With my hat on.

(Witness advised as to how to obtain duplicate.)

Q. Did you ever make application for a duplicate certificate?

A. No.

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Q. Did you tell anyone in Glenns Ferry about the loss of your certificate?

A. No.

Q. Who was your landlord in Glenns Ferry?

A. I forget.

Q. How much rent did you pay?

A. \$10.00 per month.

Q. Do you know this boy? (Exhibit photo of Lui Hip Chin.)

A. Yes, that is my brother.

Q. How long has he been in Mountain Home?

A. A couple of months.

Q. What has he been doing?

A. Nothing.

Q. Isn't it a fact that he has worked as a dishwasher and washed at the New York Cafe, Mountain Home?

A. No, he has done nothing.

Q. Did you pay his expenses from China to San Francisco?

A. No, I paid his expenses from Frisco to Mountain Home.

Q. Did you send the money to China?

A. No, I sent it to Frisco through a bank here.
(Banks closed 1 p.m. Saturday.)

Q. Did you buy a return ticket?

A. No.

Q. What did he do in China?

A. Go to school. He learn to talk American here and then he go in business.

Q. Have you any children?

A. No.

Q. Have you understood all the questions I have asked you?.

A. Yes.

(Signed in Chinese.)

(Signed) Thomas Topping,

Chinese and Immigration Inspector.

Ex parte statement of John W. Jayne introduced in evidence and marked "Govt. Exhibit D."

(GOVT. EXHIBIT D.)

Mountain Home, Idaho, December 4th, 1915.

Case of Lui Hip Chin, Section Six, Merchant.

Statement of John W. Jayne.

Q. What is your name?

A. John W. Jayne.

Q. What is your business?

A. Automobile business.

Q. How long have you been in Mountain Home?

A. About 10 years.

Q. Do you know this Chinese boy? (Exhibiting photo of Lui Hip Chin.)

A. Yes.

Q. How long have you known him?

A. I have boarded every night until two weeks ago at the New York Restaurant, Mountain Home, for a year. I first saw this boy there not less than six weeks ago. He has waited on me regularly since he first came or since I first saw him in the restaurant.

Q. Do you pass the restaurant daily or occasionally?

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A. Every day—several times every day.

Q. And during the past two weeks have you seen him in the restaurant?

A. Yes.

Q. Have you seen him do anything else beside wait on table?

A. Yes, making bread and washing dishes.

(Read back to witness.)

(Signed) John W. Jayne.

Subscribed and sworn to before me this 4th day of December, 1915.

(Signed) Thomas Topping,

Chinese and Immigration Inspector.

Ex parte statement of F. W. Boyd introduced in evidence and marked "Govt. Exhibit E."

(GOVT. EXHIBIT E.)

Mountain Home, Idaho, December 4th, 1915.

Case of Lui Hip Chin, Section Six, Merchant.

Statement of F. W. Boyd.

Q. What is your name?

A. F. W. Boyd.

Q. What is your business?

A. Probation Officer.

Q. How long have you lived in Mountain Home, Idaho?

A. Eight years.

Q. Are you a married man?

A. Yes, but my wife and boy have been at my ranch for the past six or seven months.

Q. Did you ever eat any of your meals at the New York Restaurant?

A. Yes.

Q. Do you know this Chinese boy?
(Exhibiting photo of Lui Hip Chin.)

A. Yes, he waits on table at the New York Restaurant.

Q. When did you first see him at the New York Restaurant?

A. About two months. I know the Chinaman who runs the restaurant. I had a good deal of trouble making this Chinese boy understand me.

Q. How often have you visited this restaurant during the past two months?

A. About forty times. Sometimes I would eat one meal and sometimes two.

Q. Was this Chinese boy waiting on table in the restaurant on those occasions.

A. Yes.

Read back.

(Signed) F. W. Boyd.

Subscribed and sworn to before me at Mountain Home on this 4th day of December, 1915.

(Signed) Thomas Topping,
Chinese and Immigration Inspector.

Ex parte statement of J. F. Bertram introduced in evidence and marked "Govt. Exhibit F."

(GOVT. EXHIBIT F.)

Mountain Home, Idaho, December 4th, 1915.
Case of Lui Hip Chin, Section Six, Merchant.

Statement of J. F. Bertram.

Q. What is your name?

A. J. F. Bertram.

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Q. What is your business?

A. Merchant tailor, Mountain Home, Idaho.

Q. How long have you lived in Mountain Home?

A. 10 years.

Q. Are you a married man?

A. No.

Q. Do you go to the New York Restaurant, Mountain Home for your meals?

A. Yes, I go there frequently.

Q. Do you know this boy? (Exhibiting photo of Lui Hip Chin.)

A. Yes, I don't know his name, but he waits on table at the New York Restaurant, he has waited on me a dozen times or more.

Q. When did you first see him in this restaurant?

A. About a month or six weeks ago. He was there a week ago, I have not been there for a week. I have not been in the restaurant for a week.

Q. Do you know the proprietor of the New York Restaurant?

A. Yes, I know him by the name of Lim.

(Read back to witness.)

(Signed) J. F. Bertram.

Subscribed and sworn to before me this 4th day of December, 1915.

(Signed) Thomas Topping,
Chinese and Immigrant Inspector.

Ex parte statement of H. L. Grebe introduced in evidence and marked "Govt. Exhibit G."

(GOVT. EXHIBIT G.)

Mountain Home, Idaho, December 4th, 1915.

Case of Lui Hip Chin, Section Six, Merchant.

Statement of H. L. Grebe.

Q. What is your name?

A. H. L. Grebe.

Q. How long have you lived in Mountain Home?

A. I have lived in Boise for two years and in Mountain Home for six weeks.

Q. Do you know this Chinese boy? (Exhibiting photo of Lui Hip Chin.)

A. Yes, he waited on me November 4th, 1915, at the New York Restaurant. I have not been there since. I have seen him in the restaurant when I have been passing by since that time.

(Read back to witness.)

(Signed) H. L. Grebe.

Subscribed and sworn to before me at Mountain Home, Idaho, this 4th day of December, 1915.

(Signed) Thomas Topping,

Chinese and Immigrant Inspector.

Record and Exhibits filed May 1, 1916.

None of the above exhibits were made in the presence of alien or when his counsel was present.

Examination of alien by Mr. Cavaney:

I made this statement in Exhibit A voluntarily through an interpreter. Louie Mon, Inspector Topping and myself was present when I made this statement. I was not informed of the nature of the charge against me at that time. I was first informed of the nature of the charge against me when the

warrant was served last Saturday, January 15, 1916, at Quong On Chung's store at Boise by Mr. Topping. I was taken into custody and placed in jail. I was given Exhibit B when I was admitted at San Francisco. I came to the United States to look up business opportunities. I did not have Exhibit B on me at the time the warrant was served upon me. It was taken from me at Mountain Home by Mr. Topping. I came to the United States intending to engage in the mercantile business for myself. I was visiting and helping my friends at Mountain Home, Idaho. I helped Lum Wah in the New York Restaurant at Mountain Home a little bit while I was there. I removed dirty dishes to the kitchen. I did not wait on table. I merely helped him as a friend. I did not receive any money from him or any one else for my services. I was not employed by Louie Mon in any capacity. I was just staying and boarding at the New York Restaurant as any other person would do. I do not understand English. Leong Hing waited on table while I was there. I did not wash dishes while I was there. I offered to pay for my board and room while there but Lum Wah would not accept it. While in the United States I have never engaged in mining, fishing, huckstering, peddling, laundering, or in baking, drying or otherwise preserving shell or other fish for home consumption or exportation.

Examination of alien by Inspector Topping:

I left Mountain Home on January 3rd to go to Boise. I did not 'phone or tell Louie Mon that I had

gone to San Francisco. I did not leave Mountain Home to evade arrest.

Examination of alien by Mr. Cavaney:

I have \$500.00 at Fah Wah Company, Dupont Street, San Francisco. I exhibited \$1000.00 to the United States Immigration Officers when I landed. The money was drawn by a Canton bank on a bank in San Francisco, California.

Further examination of alien by Inspector Topping:

I have not studied English since I have been in the United States. I do not understand the words Coffee, Steak, Bacon, Soup, and Bread. I can not write my name in English. You did not find me washing dishes at Mountain Home in the New York Restaurant. I have been investigating business locations in Boise, and I intended to study English when I located a permanent business. I exhibited \$1000.00 at San Francisco when I was examined under the Immigration Law. I have \$40.00 now at Quong On Chung Company in Boise but I can draw on Fah Wah Company, San Francisco, if I want any money. I should not be deported to China because I am rightfully in the United States and have not done any manual labor of any kind since I arrived.

Witness John W. Jayne being sworn by Inspector Topping testified as follows:

Examination by Mr. Cavaney:

In statement of December 4, 1915, I stated that I boarded at the New York Restaurant prior to that date. Lui Hip Chin had been there about six weeks

prior to that time. Lui Hip Chin waited on me nearly every day. He tried to take my order. There is no question but he was waiting on table. Some times the Chinese cook and proprietor would wait on table. Lui Hip Chin took my order frequently without the assistance of any other Chinese in the restaurant. I changed boarding at the New York Restaurant because they were disagreeable and I did not like them any longer. I boarded there a year prior to that time. I had trouble with the proprietor of the restaurant. I had him arrested for keeping dirty towels in his place. I did not owe him any money at that time. I perhaps owe him a few dollars at the present time.

Question: Then there is some animosity existing between yourself and the proprietor of the New York Restaurant? (Interrupted by Inspector Topping: Just a moment Mr. Cavaney. It is immaterial so far as this case is concerned whether there is any animosity existing between these Chinamen and this witness.) Mr. Cavaney was prohibited from pursuing further examination on this matter by the examining officer, Inspector Topping, and witness was prohibited from answering. Alien's counsel desired to show by this mode of questioning that there was animosity and hard feeling existing between the Chinese at Mountain Home and this witness, and also Lui Hip Chin.

Examination resumed:

Lui Hip Chin was not waiting on table all of the time. I came in the back door of the New York

Restaurant and Topping came in the front door in order to catch Lui Hip Chin on December 4, 1915. I notified the Seattle Office about Lui Hip Chin being in the New York Restaurant at Mountain Home.

Examination by Inspector Topping:

I notified the Seattle Office because I believed Lui Hip Chin was illegally here from his conduct and apparent lack of knowledge of the ways and customs of our country as I stated in my letter to the authorities. I did it out of a spirit of good citizenship. I was connected with the New York Post Office Department for about thirteen years. I have lived in Mountain Home ten years. I resigned from the Government service. Since in Idaho I have been president and director in mining companies owned by eastern people and am now in the automobile business.

Witness J. F. Bertram being sworn by Inspector Topping testified as follows:

Examination by Mr. Cavaney:

I did not know Lui Hip Chin by name but if the picture you show is the one referred to I believe as well as I can remember that he waited on me about six times. Of course it has been a long time and this is as near as I can remember. I do not know whether Lui Hip Chin was working in this restaurant as a laborer. I would consider him a laborer. I never saw him do anything else. I do not know whether he was employed by the proprietor of the restaurant or not.

Frank W. Boyd being sworn by Inspector Topping testified as follows:

Examination by Mr. Cavaney:

Lui Hip Chin waited on me in the New York Restaurant. I do not know whether Lui Hip Chin was employed in the New York Restaurant or not as a waiter. I first saw Lui Hip Chin in the restaurant in the month of November, 1915. I visited the restaurant quite frequently prior to December 4, 1915. I had some times one and some times three meals a day during that time. I am Probation Officer of Mountain Home.

Lum Wah Kee, witness for alien, being sworn by Inspector Topping testified as follows.

Examination by Mr. Cavaney:

My name is Lum Wah Kee. I run the New York Restaurant. I know Lui Hip Chin. I have known him about three or four weeks. He stayed at my place about three or four weeks during which time he boarded and roomed there. Lui Hip Chin told me he was in Mountain Home looking for business prospects. I have known Mr. John W. Jayne for three or four years. He boarded with me at the New York Restaurant. He had me arrested claiming that my towels were insanitary. Mr. Jayne did not pay me in full for his board. He still owes me \$36.20 which he has refused to pay. He has never called around since I demanded my money. Lui Hip Chin did not wash any dishes in my restaurant. Lui Hip Chin did not perform any manual labor of any kind while at my restaurant. I do not know Mr. Frank W. Boyd and Mr. J. F. Bertram. Lui Hip Chin did not wait on John W. Jayne six weeks prior to December,

1915. Mr. Jayne's statement in this regard is not true. I gave the bill against Mr. Jayne to an attorney for collection about a month ago. The Chinamen call this attorney by the name of Mack. This attorney is in town at the present time. This was about a week before Topping apprehended Lui Hip Chin at my restaurant. I do not have my account book with me but I can get it. I made the notation in this book in Chinese characters. There is no Chinese merchant's store in Mountain Home. There is not twenty-five Chinese in Mountain Home. Lui Hip Chin told me that there was not enough Chinese in Mountain Home to open up a store and that he would seek another location. Lui Hip Chin did not go to any real estate men for the purpose of making arrangements for getting a store to carry on business to my knowledge. I was in the New York Restaurant on December 4, 1915, and you (Topping) found Lui Hip Chin but he was not washing dishes. Lui Hip Chin was washing some rice about 9:30 in the morning. He was preparing his own breakfast at that time. I have lived in Mountain Home about six years.

Witness John W. Jayne recalled by Inspector Topping:

I do not know this Chinaman that has just testified by the name of Wah Kee. I know him as Lum Wah. He is the proprietor of the New York Restaurant. He did not render me a bill for \$36.20 for meals. No attorney by the name of Mack or any other attorney in Mountain Home ever endeavored

to collect the sum of \$36.20 from me for meals taken at the New York Restaurant. I do owe Lum Wah an unsettled account. I quit boarding at the New York Restaurant because the place was dirty and ill kept.

Lum Wah Kee recalled by Mr. Cavaney:

Lui Hip Chin does not understand English. He never took any orders for meals from any of the boarders in my restaurant. He was not working there and could not speak English. He helped a little in carrying dirty dishes from the table as a matter of convenience. Merely an accommodation.

Witness J. F. Bertram recalled by Inspector Topping:

I know Wah Kee. As I was passing by the restaurant one day Lum was standing by this young Chinaman and as I looked in I says: "What you doing Lum? You learning him to make bread?" and he says "Yes."

Petitioner tenders the foregoing and prays that it be allowed as a statement of all the evidence taken at said hearing in conformity with Equity Rule No. 75.

Dated this 12th day of July, 1916.

P. E. CAVANEY,
Attorney for Petitioner.

(Title of Court and Cause—No. 564.)
ORDER APPROVING STATEMENT OF
EVIDENCE.

The foregoing statement of the evidence being ten-

dered to me for settlement and allowance, and it appearing to me that said statement was lodged in due time with the clerk of this court, and notice of such lodgment and of the time of the proposed settlement appearing to have been given to all of the parties by their counsel; and it further appearing that more than ten days has elapsed since the notification of the United States Attorney for the District of Idaho and attorney for Lorenzo T. Plummer, United States Immigration Inspector, of the lodgment of said statement, and of the time and place when the petitioner herein would apply to the court or the judge thereof to approve said statement; and it further appearing that said statement is in all respects true and correct, and contains a full, true, and correct transcript of all of the evidence reduced to narrative form pertaining to the issues in said cause upon which the memorandum decision made and entered herein on the first day of May, 1916, and the memorandum decision made and entered herein on July 3, 1916, is based:

It is therefore ordered that said statement be, and the same is hereby approved for use on appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 25th day of July, 1916.

FRANK S. DIETRICH,
United States District Judge.

Endorsed: Filed July 26, 1916. W. D. McReynolds, Clerk.

(ALIEN'S EXHIBIT A.)

Form 561.

WARRANT—ARREST OF ALIEN.

United States of America

U. S. Department of Labor

Washington.

No. 53947—13.

To Lorenzo T. Plummer, Inspector in Charge, Helena, Montana, Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien,

Lui Hip Chin,

who landed at the port of San Francisco, Cal., ex SS "Siberia," on—the 20th day of September, 1915, is subject to be taken into custody and returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese-exclusion laws, for the following among other reasons:

That he has been found within the United States in violation of Section 6, Chinese-exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and that he has been found within the United States in violation of Section 6, Chinese-exclusion act of July 5, 1884, having secured admission on a certificate issued under said section, but having become a laborer since admission.

I, Louis F. Post, Assistant Secretary of Labor, by

virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expense of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1916." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of \$1000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 21st day of December, 1915.

(Signed) Louis F. Post,
Assistant Secretary of Labor.

Copy.

(ALIEN'S EXHIBIT B.)
DIRECTION FOR DELIVERY OF ALIEN FOR
DEPORTATION.

U. S. Department of Labor
Bureau of Immigration
Washington

In answering refer to No. 53947—13.

March 21, 1916.

Inspector in Charge,
Immigration Service,
Helena, Montana.

Sir:

The Bureau acknowledges the receipt of your let-

34 *Matter of Application of Lui Hip Chin*

ter of Feb. 11th, No. 4—141, transmitting record of hearing accorded the alien

Lui Hip, Chin,

who landed at the port of San Francisco, Cal., on Sept. 13, 1915.

After a careful examination of the evidence submitted in this case, the Department is of opinion that the alien is in the United States in violation of law. You are therefore directed to cause him to be taken into custody and conveyed to Seattle, Wash., for deportation, the expenses incident to such conveyance, including the employment of an attendant to assist in delivery, if necessary, at a nominal compensation of \$1.00 and expenses both ways, being authorized, payable from the appropriation "Expenses of Regulating Immigration, 1916."

The Seattle office has been requested to furnish you with sailing advices.

Respectfully,

(Signed) Alfred Hampton,

Approved: Acting Commissioner General.

(Signed) Louis F. Post,

Assistant Secretary.

Inclose W. D. No. 6192.

(Copy.)

ALIEN'S EXHIBIT C.)

Bureau of Immigration—Form S D.

WARRANT—DEPORTATION OF ALIEN.

United States of America
U. S. Department of Labor
Washington

No. 53947—13.

Inc. 6192.

To Henry M. White, Commissioner of Immigration,
Seattle, Washington.

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Thomas Topping, held at Boise, Idaho, I have become satisfied that the alien

Lui Hip Chin,

who landed at the port of San Francisco, Cal., on the 13th day of September, 1915, is subject to be returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese-exclusion laws, in that:

He has been found within the United States in violation of Section 6, Chinese-exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and he has been found within the United States in violation of Section 6, Chinese-exclusion act of July 5, 1884, having secured admission on a certificate issued under said section, but having become a laborer since admission,

I, Louis F. Post, Assistant Secretary of Labor, by

virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to China,—the country whence he came, at the expense of appropriation “Expenses of Regulating Immigration, 1916.” You are directed to purchase transportation for the alien from Seattle, Wash., to his home in China, at the lowest available rate, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 21st day of March, 1916.

(Signed) Louis F. Post,
Assistant Secretary of Labor.

(Copy.)

(Title of Court and Cause—No. 564.)

MEMORANDUM DECISION. .

May 1, 1916.

P. E. Cavaney, Attorney for Petitioner.

J. L. McClear, U. S. Attorney, Attorney for United States.

Dietrich, District Judge:

An order was made by the officers of the Bureau of Immigration for the deportation of petitioner, upon the ground that he is a Chinese laborer. It seems that he landed at the port of San Francisco on September 13, 1915, and was admitted as a merchant, but after a hearing it was found by the Department that he had since become a laborer.

As recognized by counsel for the petitioner, the

conditions under which the courts will interfere with the operations of the Immigration Department fall within very narrow limits. No serious contention is made that the petitioner was denied a fair hearing. Upon the authority of *Whitfield v. Hanges*, 222 Fed. 745, it is suggested that an immigration officer is not qualified to administer an oath at a hearing such as is involved in this case, but the suggestion would seem to be irrelevant for the reason that the record does not show by whom the oath was administered at the hearing. But even if the inference be drawn that it was administered only by the inspector the fact cannot avail the petitioner now, for no objection was made by him during the course of the hearing or at any time thereafter prior to this petition. It is further suggested that the affidavits or ex parte depositions of the applicant and certain other persons were taken by the inspector before the applicant was advised of the nature of the charge against him or had the advice of counsel. These depositions or affidavits appear in the record. Upon consideration I have held that in proceedings of this character such depositions and affidavits may be used, provided the affiants or deponents are available for cross examination, and I see no reason now for receding from that view. Counsel for the petitioner here had and embraced the opportunity of cross examining each one of the deponents, both in relation to the testimony directly given and to the statements made in the depositions or affidavits.

After all, the only serious question is whether or

not, the testimony being conflicting, there was substantial evidence to support the finding of the immigration officers, and clearly I think this question must be answered in the affirmative. Two witnesses whose testimony is admittedly unbiased concur in stating that the petitioner was engaged in service as a waiter in a Chinese restaurant at Mountain Home. It is true that they did not know under what conditions he was rendering the service, but that he did so serve cannot be doubted. Their testimony is corroborated and amplified by the testimony of another witness, who, it is claimed by the petitioner, was biased and prejudiced against him. In supervising the cross examination of this witness the inspector was in error in the view that it was immaterial to inquire about his relations to the restaurant in question and to the proprietor thereof, for such inquiry pertained to the credibility and fairness of his testimony. But it may be added that at the time the cross examination upon this head was stopped it had already gone far enough to serve the petitioner's purpose. Doubt is raised touching the credibility of the entire testimony of the petitioner and also of the proprietor of the restaurant by their unqualified denials that the petitioner ever waited upon the table in the restaurant. It is hard to escape the conviction that they wilfully perverted the truth. Furthermore, the conduct of the petitioner and of his friends among the Chinamen of the community creates a suspicion to say the least that the claim that he intended to engage in the mercantile business

was a pretension only. It was of course very easy for his friends to supply the petitioner with the thousand dollars which he seems to have had in his possession when he landed, so that the fact of such possession is not of controlling significance. It is to be considered in the light of the further fact that apparently he did not have sufficient funds at his disposal to pay his expenses from San Francisco to Mountain Home, and the money therefor was furnished by his relatives in Mountain Home.

Upon the whole, I am inclined to think that not only is there substantial evidence, but a preponderance of the evidence, in support of the finding upon which the warrant of deportation is based. The petition will therefore be denied.

Endorsed: Filed May 1, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

PETITION FOR REHEARING.

Your petitioner, by and through his attorney, P. E. Cavaney, Esq., shows to this Honorable Court:

First: That since the argument and memorandum decision rendered herein by the Honorable Court on the first day of May, 1916, refusing to grant a writ of habeas corpus in the above entitled matter, counsel for said petitioner has found a case decided on January 22, 1916, by District Judge Cochran of the United States District Court for the Eastern Division of Kentucky entitled *Ex Parte Woo Jan*,

228 Federal Reporter, page 927, directly in point on a matter of jurisdiction in the above entitled cause which was not fully presented to the Court at the time of hearing and no argument was presented upon said point at said hearing.

Second: Said petitioner further contends and shows that the Department of Commerce and Labor of the United States has no jurisdiction to deport an alien who is in the United States in violation of Section 6 of the Chinese Exclusion Act of May 5, 1892 as amended by the Act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence, or to deport an alien found within the United States in violation of Section 6 of the Chinese Exclusion Act of July 5, 1884, having secured admission on a certificate issued under said section but having become a laborer since said admission, but that the only authority to deport such an alien is found in the Chinese Exclusion Act of July 5, 1884, and subsequent amendments thereto, and that a deportment of such an alien could only be done by the Judicial Department of the Government and not by the Executive Department of the Government of the United States, and said petitioner herein makes the said decision hereinbefore referred to a part of this petition for rehearing as though the same was herein set out in haec verba.

Wherefore your petitioner prays that a rehearing may be granted herein and that said writ of habeas corpus be granted and your petitioner discharged, and your petitioner will ever so pray.

Dated at Boise, Idaho, this 1st day of July, 1916.

P. E. CAVANEY,
Attorney for Petitioner.

Endorsed: Filed July 1, 1916. W. D. McReynolds, Clerk.

(Duly verified.)

(Title of Court and Cause—No. 564.)

MEMORANDUM DECISION ON PETITION
FOR REHEARING.

July 3, 1916.

P. E. Cavaney, Attorney for Petitioner.

Dietrich, District Judge:

While appreciating and commending the spirit in which the petition for rehearing is presented, I am unable to grant the prayer thereof. The petitioner's sole reliance is the case of *Ex parte Woo Jan*, 228 Fed. 927, but while the conclusion there reached supports the petitioner's contention, I am unable to concur in it. Judge Cochran frankly states that his views are out of harmony with the trend of federal judicial opinion. And upon a re-examination of the *Wong You* case (223 U. S. 67) I am unable to escape the conclusion that in cases of this character it is optional with the Government whether it will proceed under the Chinese exclusion act or under the general immigration act. Accordingly the petition will be denied.

Endorsed: Filed July 3, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

PETITION FOR APPEAL.

To the Judge and Clerk of said Court, and to J. L. McClear, United States Attorney for the District of Idaho:

Your petitioner herein, Lui Hip Chin, by his attorney, P. E. Cavaney, Esq., feeling himself aggrieved by an order and judgment made and entered on the first day of May, 1916, in the above entitled proceeding by the Honorable Frank S. Dietrich, Judge of the above entitled Court, denying the writ of habeas corpus herein, and the order denying the petition for a rehearing in said cause made and entered by said Court on July 3, 1916, does hereby appeal from said order and judgment denying said writ of habeas corpus, and from said order denying petition for a rehearing herein, to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, and prays that his appeal may be allowed, and that a transcript of the record of the proceeding and papers upon which said order and judgment denying said writ of habeas corpus, and said petition for rehearing, duly authenticated, may be sent to the said Circuit Court of Appeals of the Ninth Judicial Circuit of the United States.

Dated this 8th day of July, 1916.

P. E. CAVANEY,
Attorney for Petitioner.

Endorsed: Filed July 8, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

ASSIGNMENT OF ERRORS.

Comes now the petitioner herein, Lui Hip Chin, by his attorney, and files the following assignment of errors upon which he will rely upon his appeal from said memorandum decision herein made by this honorable court on the first day of May, 1916, in the above entitled cause.

I.

That said memorandum decision is erroneous wherein it is held that your petitioner had a fair and impartial hearing before the said Department of Labor of the United States as contemplated by law and the rules and regulations of the said department.

II.

That said memorandum decision is erroneous wherein it held that the said Chinese Immigrant Inspector who conducted the said hearing herein did not abuse the discretion imposed in him by law and the rules and regulations of the Department of Labor of the United States at said hearing.

III.

That said memorandum decision is erroneous wherein it held that said Chinese Immigrant Inspector who conducted the hearing herein was qualified to administer an oath to the witnesses at the hearing in said cause.

IV.

That said memorandum decision is erroneous

wherein it held that your petitioner had waived his right in the court to object to certain irrelevant and incompetent testimony which was introduced upon the summary hearing in said cause before the said Chinese Immigrant Inspector because the record in said cause did not show that your petitioner objected to said testimony when the same was offered.

V.

That said memorandum decision is erroneous wherein it held that the ex parte deposition of said petitioner and certain other persons taken prior to the hearing before the Chinese Immigrant Inspector and not in the presence of the said petitioner, and before said petitioner was advised of the nature of the charge against him, and in the absence of his counsel, were admissable in evidence against the said petitioner in said proceeding.

VI.

That said memorandum decision is erroneous wherein it held that said petitioner had an opportunity to cross examine all of the parties who made ex parte statements in said cause.

VII.

That said memorandum decision is erroneous wherein it held that counsel for petitioner in said proceeding had embraced the opportunity of cross examining all said deponents.

VIII.

That said memorandum decision is erroneous wherein it held that there was substantial evidence

adduced at said hearing to support the findings of the Department of Labor of the United States.

IX.

That said memorandum decision is erroneous wherein it held that your petitioner was a laborer as contemplated by law and the rules and regulations of the Department of Labor of the United States.

X.

That said memorandum decision is erroneous wherein it held that said Chinese Immigrant Inspector did not abuse his discretion in prohibiting counsel for petitioner from cross examining a certain witness, John W. Jayne, produced on the part of the Department of Labor of the United States.

XI.

That said memorandum decision is erroneous wherein it held that said petitioner and other witnesses produced by your petitioner at said hearing swore falsely.

XII.

That said memorandum decision is erroneous wherein the court passed on the weight of the evidence in said hearing.

XIII.

That said memorandum decision is erroneous wherein it held that the claim of the petitioner to engage in a mercantile business in the United States was pretentious and not bona fide.

XIV.

Said court should have held that when your petitioner testified that he had \$1000.00 and was issued a merchant's certificate when he landed in the United States, that the burden was then shifted to the Government to overcome the prima facie showing of his right to remain in the United States as a merchant.

XV.

The court was in error in commenting upon the weight of the evidence or any presumptions arising therefrom.

XVI.

The court was in error in holding that there was a preponderance of the evidence to support the findings upon which the warrant of deportation was based.

XVII.

The said court should have held that said alien was arrested and ordered deported from the United States without due process of law.

XVIII.

Said court should have held that said warrant of arrest was issued against your said petitioner without due authority of law.

XIX.

Said court should have held that said Department of Labor of the United States had no authority whatever or at all to issue said warrant of arrest or deportation or to hear said cause.

XX.

Said court should have held that said warrant of deportation in said cause was defective and void for the reason that said warrant did not direct that the said Lui Hip Chin be deported to the port in China from which he embarked, or to the port nearest to the place where said alien was born.

XXI.

Said court should have held that said hearing and proceeding in the deportation of said alien was contrary to law and in violation of the Chinese Exclusion Laws of the United States and the rules and regulations relating thereto.

XXII.

Said court should have held that said Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, had no application to the deportation of Chinese persons in the United States in violation of Section 6 of the Act of May 5, 1892, as amended by the Act of November 3, 1893, or Section 6 of the Chinese Exclusion Act of July 5, 1884.

XXIII.

Said court should have held that there was no legal evidence taken at said hearing of said cause to justify the deportation of said alien.

XXIV.

Said court should have held that there was no evidence to show that the said Lui Hip Chin was a Chinese person.

XXV.

Said court should have granted the writ of habeas corpus.

In order that the foregoing assignments of error may be and appear of record, petitioner herein presents the same to the court and prays that such disposition may be made thereof as may be in accordance with law and the Statutes of the United States in such case made and provided, and petitioner respectfully prays a reversal of said decision made and entered in said court, and that he be discharged forthwith.

P. E. CAVANEY,
Attorney for Petitioner.
Residence and Post Office
address: Boise, Idaho.

Endorsed: Filed July 8, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

ORDER ALLOWING APPEAL.

On motion of P. E. Cavaney, Esq., attorney for petitioner, Lui Hip Chin, it is ordered that an appeal from the judgment made and entered by the Honorable Court herein on the first day of May, 1916, denying the writ of habeas corpus, and from the judgment denying the motion for rehearing herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, be, and the same is hereby allowed, and it is further ordered

that the bond for costs be and the same is hereby fixed in the sum of One Hundred Dollars.

Dated at Boise, Idaho, this 10th day of July, 1916.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed July 10, 1916.

W. D. McReynolds, Clerk.

In the District Court of the United States, District of Idaho, Southern Division.

In the matter of application of Lui Hip Chin, an Alien for a Writ of Habeas Corpus.

CITATION.

The President of the United States to J. L. McClear, United States District Attorney for the District of Idaho, and to Lorenzo T. Plummer, Chinese Immigrant Inspector in Charge at Helena, Montana, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States, District of Idaho, Central Division, wherein Lui Hip Chin, an Alien, has made application for a Writ of Habeas Corpus, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Southern Division, this 10th day of July, 1916.

FRANK S. DIETRICH,
Judge of the United States District Court for the District of Idaho, Central Division.

Filed July 10, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause—No. 564.)

PRAECIPE.

To the Clerk of the above entitled Court:

You are hereby requested to transmit in printed form to the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the following portions of the record in the above entitled cause, to-wit:

1. Petition for Writ of Habeas Corpus.
2. Order for Writ of Habeas Corpus.
3. Demurrer.
4. Minutes of the Court in relation to said matter.
5. Statement of the evidence.
6. Memorandum decision of the Court.
7. Petition for rehearing.
8. Memorandum decision denying rehearing.
9. Petition for appeal.
10. Assignment of errors
11. Order allowing appeal.

12. Citation.

13. This praecipe.

14. All exhibits used upon the hearing of said cause. Said exhibits to be printed at length in the record at the respective places where it is shown by the statement of the evidence the said exhibits were admitted in evidence.

Petitioner hereby tenders copies of the above specified portion of the record to be used upon the appeal herein which it will be necessary for you to transcribe.

Dated at Boise, Idaho, this 12th day of July, 1916.

P. E. CAVANEY,

Attorney for Petitioner.

Endorsed: Filed July 12, 1916.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS, Clerk.

(Seal.)

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing tran-

script of pages from 1 to 52, inclusive, contain true and correct copies of the petition for a Writ of Habeas Corpus, Order for Writ of Habeas Corpus, Demurrer, Minutes of the Court, Statement of Evidence, Memorandum Decision of the Court, Petition for Rehearing, Memorandum Decision Denying Petition for Rehearing, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Citation (original), Praecipe, Return to Record and Clerk's Certificate, which together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$62.70, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 26th day of July, 1916.

W. D. McREYNOLDS,

(Seal.)

Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit

*In the matter of application of Lui Hip Chin, an
alien, for a Writ of Habeas Corpus.*

EX PARTE LUI HIP CHIN, Appellant.

Brief of Appellant

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

P. E. CAVANEY, Boise, Idaho,
Attorney for Appellant.

J. L. McCLEAR,

U. S. District Attorney, Boise, Idaho,
Attorney for the Department of Labor.

Filed

SEP 25 1916

F. D. Monckton,
Clerk.

No. 2841.

United States
Circuit Court of Appeals

For the Ninth Circuit

*In the matter of application of Lui Hip Chin, an
alien, for a Writ of Habeas Corpus.*

EX PARTE LUI HIP CHIN, Appellant.

Brief of Appellant

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

P. E. CAVANEY, Boise, Idaho,
Attorney for Appellant.

J. L. McCLEAR,
U. S. District Attorney, Boise, Idaho;
Attorney for the Department of Labor.

No. 2841.

United States
Circuit Court of Appeals
For the Ninth Circuit

*In the matter of application of Lui Hip Chin, an
alien, for a Writ of Habeas Corpus.*

EX PARTE LUI HIP CHIN, Appellant.

Brief of Appellant

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

This is an appeal from a decision of the District Court of the United States for the District of Idaho, Southern Division, sustaining an order of deportation of appellant, Lui Hip Chin, made by the Department of Labor of the United States after a summary hearing was had by direction of Lorenzo T. Plummer, U. S. immigrant and Chinese inspector in charge of Helena Division, before Thomas Topping, immigrant inspector, on January 19, 1916, on the charge that appellant had been found within the United States in violation of Section 6, Chinese Exclusion

Act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and that appellant was found within the United States in violation of Section 6, Chinese Exclusion Act of July 5, 1884, having secured admission on a certificate issued under said section but having become a laborer since admission.

Government's Exhibit "B" (page 16, transcript), the same being Certificate of Identity, card No. 20794, was duly and regularly issued to said alien by the immigration officials in charge at the Port of San Francisco, California, and by reason thereof said alien was admitted as a Section 6 Canton Merchant, No. 14662, 4-8 S.S. "Siberia," September 13, 1915. On December 4, 1915, the alien was found by Inspector Topping at Mountain Home, Idaho, in the New York Restaurant, which is owned by a Chinaman by the name of Lum Wah, at which time and place an ex parte statement was taken from the alien which was later introduced in evidence at the hearing and being Government's Exhibit "A" (page 14, transcript). At the same time Government's Exhibits "C," "D," "E," "F" and "G" were taken by the said immigrant inspector from certain other persons, which were also introduced in evidence at the summary hearing.

Lui Hip Chin left Mountain Home shortly thereafter and came to Boise, Idaho, where he was arrested by Inspector Topping on Departmental Warrant, alien's Exhibit "A" (page 32, transcript). The sum-

mary hearing was had on January 19, 1916, before Immigrant Inspector Topping. After the hearing was had and the record was duly and regularly transmitted to the Department of Labor, Bureau of Immigration, Washington, D. C., on March 21, 1916, the Assistant Secretary of Labor found that the alien was in the United States in violation of law and ordered him to be taken into custody and conveyed to Seattle, Washington, for deportation. On the same date the Commissioner of Immigration at Seattle, Washington, was ordered to deport Lui Hip Chin to China, the country from whence he came. The alien sued out a writ of habeas corpus to the District Court of the United States for the District of Idaho, Southern Division. On the 15th day of April, 1916, J. L. McClear, United States Attorney for the District of Idaho filed a demurrer to the petition upon the ground that the petition did not state facts sufficient on which to grant the writ (page 12, transcript). A hearing was had upon the said demurrer and the Court rendered a memorandum decision on May 1, 1916, sustaining the decision of the Department of Labor, and denied the writ (page 36, transcript). On July 1, 1916, a motion for a rehearing was duly and regularly made by appellant herein (page 39, transcript), and on July 3, 1916, a rehearing was denied (page 41, transcript). This appeal is from the decision of the Court.

Appellant maintains and contends that the said Court committed error herein as more particularly herein set out, to-wit:

ASSIGNMENTS OF ERROR.

I.

That said memorandum decision is erroneous wherein it is held that your petitioner had a fair and impartial hearing before the said Department of Labor of the United States as contemplated by law and the rules and regulations of the said department.

II.

That said memorandum decision is erroneous wherein it held that the said Chinese Immigrant Inspector who conducted the said hearing herein did not abuse the discretion imposed in him by law and the rules and regulations of the Department of Labor of the United States at said hearing.

III.

That said memorandum decision is erroneous wherein it held that said Chinese Immigrant Inspector who conducted the hearing herein was qualified to administer an oath to the witnesses at the hearing in said cause.

IV.

That said memorandum decision is erroneous wherein it held that your petitioner had waived his right in the court to object to certain irrelevant and incompetent testimony which was introduced upon the summary hearing in said cause before the said Chinese Immigrant Inspector because the record in said cause did not show that your petitioner objected to said testimony when the same was offered.

V.

That said memorandum decision is erroneous wherein it held that the ex parte deposition of said petitioner and certain other persons taken prior to the hearing before the Chinese Immigrant Inspector and not in the presence of the said petitioner, and before said petitioner was advised of the nature of the charge against him, and in the absence of his counsel, were admissable in evidence against the said petitioner in said proceeding.

VI.

That said memorandum decision is erroneous wherein it held that said petitioner had an opportunity to cross examine all of the parties who made ex parte statements in said cause.

VII.

That said memorandum decision is erroneous wherein it held that counsel for petitioner in said proceeding had embraced the opportunity of cross examining all said deponents.

VIII.

That said memorandum decision is erroneous wherein it held that there was substantial evidence adduced at said hearing to support the findings of the Department of Labor of the United States.

IX.

That said memorandum decision is erroneous wherein it held that your petitioner was a laborer as contemplated by law and the rules and regula-

tions of the Department of Labor of the United States.

X.

That said memorandum decision is erroneous wherein it held that said Chinese Immigrant Inspector did not abuse his discretion in prohibiting counsel for petitioner from cross examining a certain witness, John W. Jayne, produced on the part of the Department of Labor of the United States.

XI.

That said memorandum decision is erroneous wherein it held that said petitioner and other witnesses produced by your petitioner at said hearing swore falsely.

XII.

That said memorandum decision is erroneous wherein the Court passed on the weight of the evidence in said hearing.

XIII.

That said memorandum decision is erroneous wherein it held that the claim of the petitioner to engage in a mercantile business in the United States was pretentious and not bona fide.

XIV.

Said Court should have held that when your petitioner testified that he had \$1000.00 and was issued a merchant's certificate when he landed in the United States, that the burden was then shifted to the Government to overcome the prima facie showing of his right to remain in the United States as a merchant.

XV.

The Court was in error in commenting upon the weight of the evidence or any presumptions arising therefrom.

XVI.

The Court was in error in holding that there was a preponderance of the evidence to support the findings upon which the warrant of deportation was based.

XVII.

The said Court should have held that said alien was arrested and ordered deported from the United States without due process of law.

XVIII.

Said Court should have held that said warrant of arrest was issued against your said petitioner without due authority of law.

XIX.

Said Court should have held that said Department of Labor of the United States had no authority whatever or at all to issue said warrant of arrest or deportation, or to hear said cause.

XX.

Said Court should have held that said warrant of deportation in said cause was defective and void for the reason that said warrant did not direct that the said Lui Hip Chin be deported to the port in China from which he embarked, or to the port nearest to the place where said alien was born.

XXI.

Said Court should have held that said hearing and proceeding in the deportation of said alien was contrary to law and in violation of the Chinese Exclusion Laws of the United States and the rules and regulations relating thereto.

XXII.

Said Court should have held that said Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, had no application to the deportation of Chinese persons in the United States in violation of Section 6 of the Act of May 5, 1892, as amended by the Act of November 3, 1893, or Section 6 of the Chinese Exclusion Act of July 5, 1884.

XXIII.

Said Court should have held that there was no legal evidence taken at said hearing of said cause to justify the deportation of said alien.

XXIV.

Said Court should have held that there was no evidence to show that the said Lui Hip Chin was a Chinese person.

XXV.

Said Court should have granted the writ of habeas corpus.

POINTS AND AUTHORITIES.

I.

Appellant was not accorded a fair and impartial hearing.

Ong Chew Lung v. Burnett, Im. Insp., 232 Fed. (C. C. A.) 853.

U. S. v. Fong Hong, 233 Fed. (D. C.) 168.

U. S. v. Fong Duck, 172 Fed. 856, 97 C. C. A. 204.

Lin Hop Fong v. U. S., 209 U. S. 453, 52 L. Ed. 888.

McDonald v. Sin Tak Sam, 225 Fed. 710, 140 C. C. A. 584.

Whitfield v. Hanges, 222 Fed. 745, 138 C. C. A. 199.

Ex Parte Lam Pui, 217 Fed. 456.

Re Yee Bing Hi, 128 Fed. 319.

Joras v. Allen, 138 C. C. A. 211.

Ex Parte Chin Loy You, 223 Fed. 833.

II.

The Immigrant Inspector abused the discretion imposed in him by the Immigration Act and the rules and regulations of the Department of Labor of the United States.

Low Wah Suey v. Backus, 225 U. S. 460, 56 L. Ed. 1165.

Japanese Immigrant Case, 189 U. S. 86, 47 L. Ed. 721.

. Ex Parte Bun Chew, 220 Fed. 387.

Ex Parte Chin Loy You, *supra*.

III.

The Immigrant Inspector was not qualified to administer an oath to witnesses in said case.

Whitfield v. Hanges, *supra*.

Hanges v. Whitfield, 209 Fed. 675.

McDonald, Immigration Inspector, v. Sin Tak Sam, *supra*.

IV.

Appellant did not waive his right to object to irrelevant, incompetent testimony offered at the summary hearing. See (b) sub-division 4, Rule 22, Immigration Rules, November 15, 1911.

Lin Hop Fong v. U. S., *supra*.

Ex Parte Lam Pui, *supra*.

There must be substantial evidence to support deportation.

Woo Jew Dip v. U. S., 192 Fed. 471.

V.

Ex parte statements which appellant was not given an opportunity to refute are inadmissible in evidence against him.

McDonald v. Sin Tak Sam, *supra*.

Hanges v. Whitfield, *supra*.

VI and VII.

Appellant was not afforded an opportunity to cross examine all the parties who made ex parte statements against him.

McDonald v. Sin Tak Sam, *supra*.

Hanges v. Whitfield, *supra*.

See transcript, page 15, Government's Exhibit "A."

See transcript, page 16, Government's Exhibit "C."

See transcript, page 23, Government's Exhibit "G."

VIII.

There was no substantial evidence introduced at said hearing to support the deportation.

Woo Jew Dip v. U. S., *supra*.

In re Jew Wong Lay, 91 Fed. 471.

U. S. Lee Huen, 118 Fed. 19.

The evidence should be carefully weighed and considered.

Lim Som v. U. S. 189 Fed. 534.

2 C. J. 1103.

IX.

Appellant was not a laborer. A Chinese laborer is one who has to work at common labor to gain a livelihood.

U. S. v. Chong Ki Foon, 83 Fed. 143.

Camp Bird v. Larson, 152 Fed. 157.

2 C. J. 1093.

Appellant was a Chinese merchant.

Ong Chew Lung v. Burnett, *supra*.

U. S. v. Ching Chong Pong, 192 Fed. 722.

U. S. v. Wing Lee, 136 Fed. 701.

U. S. v. Fong Hong, 233 Fed. 168.

Lin Hop Fong v. U. S., 290 U. S. 453.

The burden of proof shifted to the Government when Lui Hip Chin produced his certificate of identity, Exhibit "B," which must be overcome by proof clear and convincing.

Jew Sing v. U. S., 97 Fed. 582.

The proof should be clear and convincing, and until the Government has made out such a case, the holder of the certificate is not required to invoke further proof.

Jew Sing v. U. S., *supra*.

U. S. v. Hon Lim, 214 Fed. 456.

2 C. J. 1102.

Uncontradicted evidence, free from improbability, when given by disinterested witnesses in no way discredited, is conclusive.

U. S. v. Lee Huen, *supra*.

In Quock Ting v. U. S., 140 U. S. 417.

2 C. J. 1103.

Evidence of a Chinaman should not be discredited.

U. S. v. Hong Lim, *supra*.

Wong Ho v. U. S., 109 Fed. 888.

2 C. J. 1104.

There must be legal evidence to overcome merchant's certificate.

Lin Hop Fong v. U. S., 290 U. S. 453.

Ong Chew Lung v. Burnett, *supra*.

X.

Immigrant Inspector abused the discretion imposed in him by refusing counsel for appellant to cross examine Government's witness, Jayne. See transcript, page 26.

Authorities cited under assignment No. 2, *supra*.

Before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstance or conjecture, that he has obtained such admission by means of fraudulent representations.

Ex Parte Lam Pui, *supra*.

Ex Parte Lam Fuk Tak, 217 Fed. 468.

McDonald v. Sin Tak Sam, *supra*.

U. S. v. Fong Hong, *supra*.

XI, XII and XIII.

The Court cannot weigh the evidence in such cases.

Wong Yee Foon v. Stump, 233 Fed. 194.

Or pass on the credibility of the witnesses.

Gegiow v. U. S., 239 U. S. 2.

Harlan v. McGourin, 218 U. S. 445, 54 L. Ed. 1101.

Ex Parte Hindekuni Iwata, 219 Fed. 610.

Hanges v. Whitfield, *supra*.

Chin You v. U. S., 208 U. S. 8, 58 L. Ed. 369.

White v. Gregory, 213 Fed. 768.

Lewis v. Frick, 233 U. S. 291, 58 L. Ed. 967.

XIV.

The introduction in evidence of appellant's Exhibit "B" made out a *prima facie* case in favor of the alien and established his right to remain in the United States.

Ong Chew Lung v. Burnett, *supra*.

U. S. v. Tong Sen, 205 Fed. 398.

U. S. v. Fong Hong, *supra*.

Lin Hop Fong v. U. S., *supra*.

U. S. v. Chin Chong Pong, 192 Fed. 722.

XV and XVI.

The Court should not have commented on the evidence.

White v. Gregory, *supra*.

XVII, XVIII, XIX, XXI and XXII.

Appellant was arrested and ordered deported without due process of law.

Ex Parte Woo Jan, 228 Fed. 927.

Ex Parte Chin Loy You, *supra*.

Ex Parte Tom Yuen, 230 Fed. 656.

U. S. ex rel. Lem Him v. Prentis et al., 230 Fed. 935.

Lin Hop Fong v. U. S., *supra*.

U. S. v. Fong Hong, *supra*.

XX.

Appellant should have been ordered deported to his place of residence in China.

Ex Parte Gytel et al., 210 Fed. 918.

U. S. ex rel. N. G. Sam et al. v. Redfern, 210 Fed. 548.

XXIII.

There was no legal evidence to justify deportation.

N. Jin Quan v. U. S., 210 Fed. 617.

XXIV.

The burden of proof was on the Government to

show that appellant was a Chinese person, which it failed to do.

U. S. v. Chin Sing Quong, 224 Fed. 752.

U. S. v. Ching Chong Pong, *supra*.

XXV.

The Court should have granted the writ and discharged appellant.

Authorities cited *supra*, one to twenty-four inclusive.

ARGUMENT.

Appellant maintains that the summary hearing accorded him herein by the Immigrant Inspector was arbitrary and unfair and not according to law and the rules and regulations of the Department of Labor of the United States. It is conceded by the Government in this case that Lui Hip Chin entered the United States as a Canton merchant upon the proper credentials, as shown by the certificate of identity which was issued to him at San Francisco, California, on the 20th day of September, 1915 (page 16, transcript), also the testimony of Lui Hip Chin (pages 23 to 25 inclusive, transcript). Lui Hip Chin having been admitted by the immigration authorities to enter the United States as a Chinese merchant, he came under Article 2 of the Treaty of the Chinese Empire with the United States, which provides, among other things: "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or for curiosity, etc., * * * * * shall

be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation."

According to the testimony in this case, Lui Hip Chin exhibited to the immigration authorities upon entering the United States, a draft drawn by a Canton bank on a bank in San Francisco, California, for the sum of \$1000.00. According to his own testimony, he landed at San Francisco and stayed there about two months, and came to Mountain Home, Idaho, about two months before his arrest. (Pages 14 and 23 to 25 inclusive, transcript.)

Alien claims that he came to the United States to look up business opportunities and that while at Mountain Home he helped his friend, Lum Wah, of the New York Restaurant at Mountain Home, and he was merely staying at the New York Restaurant as any other person would stay there. He came to Mountain Home to look up business opportunities and also to visit his brother, Lui Mon, who lived there. There is nothing in the evidence to show that the status of Lui Hip Chin had changed or that he was compelled to perform manual labor for his livelihood. The mere fact that he occasionally assisted in removing dirty dishes from the tables of Lum Wah's restaurant at Mountain Home was not sufficient to show that he was not a merchant.

In the case of *Ong Chew Lung v. Burnett, Im. Insp.*, 232 Fed. 853, at page 855 the Court said:

“Before appellant can be lawfully deported, it must be shown by competent evidence that he obtained admission by fraudulent representations.”

Further, in *Lin Hop Fong v. U. S.*, 209 U. S. 453, 52 L. Ed. 888, the Supreme Court said that the certificate “certainly ought to be entitled to some weight,” and held that a Chinaman having been duly admitted to residence thereunder could not be deported “unless there is some competent evidence to overcome the legal effect of the certificate.”

“It is not our function to weigh the evidence in this class of cases; but we may consider the question of law, whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion and not upon evidence. In the absence of substantial evidence to sustain the same, an order of deportation is arbitrary and unfair and subject to judicial review.”

In the case of *U. S. v. Fong Hong*, 233 Fed. 168, at page 169 the Court said:

“The defendant’s admission to this country under a merchant’s certificate admittedly in due form, placed him in the exempt class, and he cannot be deported for having fraudulently entered the United States unless there is some competent evidence to overcome the legal effect of the certificate.”

Citing *Lin Hop Fong v. U. S.* supra, at page 170 the Court further said:

“It is to be noted further that Chinese subjects of the exempt class (merchants, etc.), when admitted to this country, are to be accorded all the rights, privileges, immunities and exemptions

which are accorded to citizens and subjects of the most favored nation. Under this treaty, a Chinese subject of the exempt class, regularly admitted to this country, must be held to have obtained a status the same as is obtained by an immigrant from the most favored nation. This being so, it follows that such status continues with him, so far as his right to remain in this country is concerned, notwithstanding that he may subsequently to his admission, whether through choice or necessity, become a laborer. This conclusion accords with that reached by Judge Lowell in *re Yew Bing Hi*, 128 Fed. 319."

By Government's Exhibit "B," alien's certificate of identity, alien was admitted as a Section 6 Canton Merchant No. 14662, and this established his status as a member of the exempt class, and therefore he cannot be deported unless the Government has established by sufficient evidence that he fraudulently entered the United States. There is not one scintilla of evidence in this record to show fraud in the entry of this alien, and the record further fails to disclose that said alien had done anything which would change his status from that of a merchant. If the Government was relying upon the grounds of fraud in this case, it seems quite apparent that they absolutely failed to establish it. The summary hearing which was accorded to appellant herein was not fair as contemplated by law and the rules and regulations of the Department of Labor for the reason that all of the ex parte statements which were used in this case, with the exception of Government's Exhibit "A," were taken from the respective parties by the Immigrant Inspector not in the presence of the alien

or in the presence of his counsel or even when he had an opportunity to procure counsel, and also without informing him of the nature of the charge for which he was called to answer. It appears that this contention is sustained by the weight of authority, that in this class of cases the alien should be permitted to have counsel at all stages of the hearing, and that he should be advised of the nature of the charge which he is to meet before any statement is taken from him or from any other person that would materially affect his rights. If this is not permitted, the Immigrant Officer will abuse the discretion which is imposed in him by the Immigration Law. It is unfair to take a statement from an alien who is not accustomed to the ways of our country and its customs without disclosing to him the nature of the charge for which he is being examined. This is a fundamental principal of procedure accorded to every person in the Anglo Saxon countries. This alien is not a criminal, nor has he committed any heinous offense, nor is he charged with having committed any offense. Therefore, as a matter of courtesy and right which is accorded to him under the treaty which his country has with the United States, he should be given every opportunity to protect his rights. This record will disclose that the Government's Exhibits "C," page 16, transcript; Government's Exhibit "D," page 19, transcript; Government's Exhibit "E," page 20, transcript; Government's Exhibit "F," page 21, transcript, and Government's Exhibit "G," page 23, transcript, were all ex

parte statements taken not in the presence of alien nor his counsel and taken long prior to the time when the case was set for hearing, and Government's Exhibit "C" and Government's Exhibit "G" were introduced in evidence and counsel for alien was not accorded the privilege or opportunity of cross examining said witnesses on said statements. All of the above exhibits were introduced in evidence over the objection of counsel for alien. The record does not disclose, however, the objections made because it was understood between the examining officer and counsel for alien that in conformity with Subdivision 4, Rule 22 of Immigration Laws and Rules, November 15, 1911, all objections were to be raised in the briefs and argument.

The summary hearing was not fair for the further reason that Inspector Thomas Topping had no power to administer oaths or to swear witnesses at said hearing, as was held in the case of *Whitfield v. Hanges*, supra. Also, Inspector Topping attempted to testify in said case without having been sworn as a witness. (Page 14, transcript, at bottom of page.)

Question (by Topping): I found him washing dishes this morning in the New York Cafe.

On page 15 of the transcript, a notation by the Inspector is as follows: "Note: The hands of Lui Hip Chin show very distinctly that he has been wash-in dishes for some time."

This action on the part of the Inspector was unfair and unjust to alien for the further reason and upon the ground that the said Inspector had not qualified

as a witness competent to testify on matters of this kind, and was purely speculative and prejudicial.

On page 26 of transcript, counsel for appellant was prohibited from cross examining the witness, John W. Jayne, by Inspector Topping when counsel for appellant was attempting to show that John W. Jayne was prejudiced against Lui Hip Chin, Lum Wah and other Chinese persons at Mountain Home. This privilege should have been granted to counsel to show what interest or prejudicial feeling the witness may have toward the alien in order to determine whether or not he was testifying truthfully and honestly. I think the testimony of John W. Jayne, page 25 transcript and page 29 transcript, shows him to be a person who would not likely tell the truth in an investigation of this kind.

The evidence further discloses that Lui Mon was running a tailor shop in Mountain Home in competition with Government's witness, J. F. Bertram, and that he undoubtedly would be glad to cause the Chinaman as much trouble as possible.

The evidence further discloses that at the time of the hearing Lui Mon was not available for cross examination by the alien, nor was H. L. Grebe available for cross examination.

Government's Exhibit "C," page 16 transcript, shows that Lui Mon did not have his certificate of residence and undoubtedly he evaded the officers and could not be found on the day of the hearing on account of being afraid that he might also be deported for not having his certificate of residence.

The evidence further discloses that John W. Jayne was extremely anxious to assist in the capture and deportation of this alien, as the record will disclose he assisted Inspector Topping in locating the alien in Mountain Home, Jayne coming in the back door of the restaurant while Topping went in the front door. (Pages 26 and 27, transcript.)

The hearing was also unfair and did not afford the alien an opportunity to be present when the witnesses were examined for the reason and upon the grounds that at the hearing the Inspector did not have the alien present but that he was identified by means of a photograph, and the evidence does not disclose that the particular photograph in question was in truth and in fact a true and correct photograph of Lui Hip Chin. The Inspector tried to show that the alien had left Mountain Home for the purpose of evading arrest, and that he came to Boise, Idaho. However, the alien explains this, that he came to Boise not to evade arrest, but to look up business opportunities, which is perfectly consistent with his former statements and his purpose in this country.

Counsel for alien contends further that alien could not be deported under the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, and March 4, 1913; because of the alien being in the United States in violation of Section 6 of the Act of May 5, 1892, as amended by the Act of November 3, 1893, or Section 6 of the Chinese Exclusion Act of July 5, 1884, for the reason and upon the grounds that the immigration authorities, under this

Act, have no authority to deport a Chinese laborer or merchant, and the only way they can be deported is under the Chinese Exclusion Act, which contention has been ably presented by Judge Cochran in the case of *Ex Parte Woo Jan*, 228 Fed. 927, and sustained in subsequent cases, cited *supra*.

The evidence in this case does not disclose that Lui Hip Chin ever at any time during the time that he was in the United States, performed any manual labor for his self support or livelihood, or that he was compelled to perform such labor, but that he occasionally assisted Lum Wah, merely as a friend, to remove some dirty dishes from the table of the restaurant during the time that he was there. It cannot be conceived of how this kind of labor would place this alien in the class of a laborer. It has been uniformly held by all of the Courts that if the alien duly and regularly entered the United States as a merchant, the fact that he performed manual labor of the kind that Lui Hip Chin performed in this instance, he would not be subject to deportation as coming within the class of persons excluded from the United States. This man's appearance, his conduct, his dress and manners show him to be a Chinese person of considerable education and refinement, and he has every appearance of being a merchant and being a person who would not be a charge upon this country or cause this country any trouble of any kind.

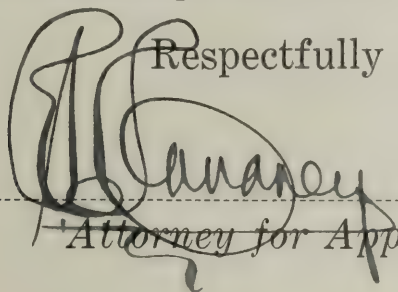
The Government has failed absolutely to establish a case and the evidence falls far short of showing

that Lui Hip Chin fraudulently entered the United States or that he became a laborer after entering the United States. The Government used every effort possible to obtain evidence in this case and it was within the power of the Government to ascertain whether or not the statements made by the alien were true or untrue, but the fact that they have failed to establish these facts and have permitted the record to stand as it now stands is conclusive of the fact that they could not refute his statements, and his statements and the statements of other witnesses on his behalf are the truth and are entitled to be considered in the hearing of this case the same as the testimony of any other witnesses. The mere fact that a Chinaman testifies in a case should not be conclusive or even presumptive that he is not telling the truth. A Chinaman's testimony, when under oath, should be accorded the same sanctity as is accorded to any other person, and their statements should be taken as true until the contrary is established by legal evidence. This is a fundamental principle which lies at the bottom of all institutions of the Anglo Saxon race, and there can be no reason why the Government should depart from this principle in cases of this kind, and especially where a Chinese merchant is attempted to be expelled from this country. There is a vast distinction in the class of cases between a person who violates the intent of the Immigration Act and cases of this kind. The Immigration Act in itself makes particular things an offense and makes the perpetrator thereof, in a sense,

guilty of a crime, and provides for a summary hearing, and, if the charges are proven, the alien is expelled as being an undesirable citizen. I do not believe that this class of cases should come within the same category and the same rules should be applicable here even though the Court should find that the immigration authorities can expel an alien who is in this country in violation of the Chinese Exclusion Act, as is being attempted to be done in this case. A Chinese merchant, under the treaty, is a privileged person and should be accorded the same rights and privileges and immunities as is accorded an alien of the most favored nation. It cannot be said that we have accorded an alien merchant this right if we summarily deport him on rumor, hearsay and trumped-up charges.

We respectfully submit in this case that there is no evidence here to show that this alien was in the United States in violation of Section 6 of the Chinese Exclusion Act, or that he became a laborer since his admission to the United States, and that the Court should discharge the alien.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. C. Canavan". The signature is written in a cursive, flowing style. It is positioned above a horizontal dashed line.

Attorney for Appellant Lui Hip Chin;

Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

*In the Matter of Application of Lui Hip Chin, an Alien,
for a Writ of Habeas Corpus.*

Brief of Appellee

*Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.*

J. L. McCLEAR,
United States Attorney, District of Idaho.

JOHN R. SMEAD,
Assistant U. S. Attorney, District of Idaho.
Attorneys for Appellee.

Residence, Boise, Idaho.

Filed

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No. 2841.

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Brief of Appellee

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*In the Matter of Application of Lui Hip Chin, an Alien,
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Brief and Argument for Appellee

The statement of the case set forth in the brief of appellant appears to be sufficient for the purpose of this appeal and will make no additional statement.

The appellant alleges twenty-five assignments of error in this case, most of which are answered by the evidence as set forth in the transcript of record. The only assignments of error which are not answered by the evidence are those which raise the question of jurisdiction of the court and are assignments XVII, XVIII, XIX, XXI and XXII. The attorney

for appellant in his points and authorities cites a great many authorities which it is claimed are not authorities in this case as the evidence in the case is far different from the evidence as shown in most of the cases cited in appellant's brief, and a perusal of the evidence in this case is sufficient to show that the appellant had a fair and impartial hearing.

The alien was found at Mountainhome by the Inspector, Thomas Topping, and preliminary statements were taken from the alien and five other witnesses, one Chinaman and four Americans. These statements, with the report of the Inspector, were sent to the Department of Labor at Washington on which the warrant of arrest was issued and on which the alien was arrested. When he was arrested he was brought before the Inspector at Boise, Idaho, accompanied by his counsel, P. E. Cavaney, and from that time on he was represented by counsel at all stages of the proceedings. This proceeding is in accordance with the law as laid down in the case of *Low Wah Suey and Li A. Sim vs. Samuel W. Backus*, Commissioner of Immigration, 225 U. S., p. 459 (56 L. Ed.) 1165. On page 1168 the Court says as follows:

"It is further alleged that Li A. Sim was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and before she had been advised of her right to counsel, and before she was given an opportunity of securing bail; and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that, under examination before the inspecting officer,

at first she had no counsel. Such an examination is within the authority of the statute and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel."

The alien was represented by his attorney in all proceedings, after the warrant was issued, and had the privilege of cross-examining the witnesses as to the statements made before the issuance of the warrant and all witnesses introduced by the Government after that time, with the exception of two, who, for some reason, it appears were not present. These witnesses were Lui Mon, a Chinaman at Mountainhome, and H. L. Grebe, of Mountainhome. But it is contended on the part of appellee that outside of these two witnesses there is evidence enough to sustain the Department of Labor, and that the proceedings did not deprive alien of his fundamental right and that the order for deportation was made on evidence tending to prove that he was a laborer unlawfully within the country.

In the case of Low Wah Suey and Li A. Sim vs. Samuel W. Backus, *supra*, on page 1167, the Court states as follows:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

As said by the District Judge in this case in his memorandum decision:

“No serious contention is made that the petitioner Was denied a fair hearing.”

By Assignment No. XIV it is claimed that the burden of proof shifted to the Government when the certificate in this case was introduced in evidence.

In the case of *United States vs. Quan Wah*, 224 Fed., 420, it is said by the Circuit Court of the Second Curcuit :

“In proceedings to deport a Chinese unlawfully in the United States, the burden of showing the right to remain within the United States is on him.”

And the Court says further in that case :

“It is quite evident that Judge Chatfield found this unpersuasive testimony sufficient to call for a reversal of the commissioner’s decision, because he held that a Chinese person did not have the burden of showing his right to remain in this country, and that it was for the government to show affirmatively that he was not a merchant, nor a merchant’s son, and that he never had a statutory certificate. Since we construe the statute differently, and have held (*U. S. v. Hom Lim*, 223 Fed. 520, C. C. A.), that the burden of showing his right to remain is on the Chinese person, we reach a different conclusion upon the same proof.”

And further, in the case of *Sibray vs. United States*, Vol. 227 Fed. Rep., on page 7, the Court says :

“The burden was on him (the alien) to prove his right to be here and on this point his cretificate of identity was not conclusive but was merely one item of relevant evidence.”

The above case is a case where an alien was admitted at the port of San Francisco as a student but afterward was found working as a laborer.

And in the case of *Sibray vs. United States*, the court says, on page 7 :

“Testimony tending to show that he was not a student but a laborer was offered and we have nothing to do with its weight. It is true the proceeding was not conducted in all respects as if a trial in court had been in progress but this was not necessary. The Act of 1907 contemplates a summary investigation and not a judicial trial, and while the alien’s right to be heard must be respected, and the discretion of the officials must not be abused, the formalities of procedure and the rules governing the admissability of evidence have been much relaxed.”

It appears that the alien from the time of his arrest was represented by counsel in all stages of the proceedings, after that time making no objection to the proceedings before the Immigration Inspector, Thomas Topping; that he had a fair hearing, wherein evidence was introduced tending to support the position of the Government that the alien was admitted as a merchant and was afterward found working as a laborer; that as to all questions raised by appellant’s brief, except the matter of jurisdiction of the Bureau of Labor, the proceedings and findings are final.

Low Wah Suey vs. Backus, *supra*.

Assignment XX, alleging that the warrant of deportation was defective and void for the reason that said warrant did not direct that the alien should be deported to the Port of China from which he embarked, seems to have overlooked the Government’s Exhibit C found on page 35 of the Transcript of the Record, which is the warrant of deportation and states as follows:

“You are directed to purchase transportation for the alien from Seattle, Washington, to his home in China.”

Which seems to be sufficient to answer the objection of the appellant.

As to assignments raising the question of jurisdiction, namely, XVII, XVIII, XIX, XXI and XXII, and citing the case *Ex parte Woo Jan*, 228 Fed. 927, the conclusion in that case holds that the Immigration Department had no power to deport Chinese laborers; the District Judge in that case, after so holding, states as follows:

“In so holding, I run counter to the trend of Federal judicial opinion on the subject.”

and cites a number of cases in which a contrary doctrine has been held.

The case of *United States vs. Wong You, Wong Cheen, et al.*, 223 U. S., p. 67 (56 L. Ed.), p. 354, holds that Chinese laborers may be deported, and the same doctrine is laid down in the case of *Sibray vs. United States*, 227 Fed. 1; *Ex parte Li Dick*, 174 Fed. 674, 176 Fed. 998; and case of *Haw Moy vs. North*, 183 Fed. 89.

We respectfully submit that the alien in this case had a fair and impartial hearing; that the Inspector did not exceed his authority; that the alien was represented by counsel at all times which he was entitled to be represented; and as found by the District Judge, there is a preponderance of evidence to show that he was a laborer found within the United States and subject to be deported, and the District Court should be sustained in finding that he should be returned to China.

Respectfully submitted,

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